Supreme Court, U.S.
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In The
Supreme Court of the United States

DENNIS J. PAPPAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit and the United States Court of Federal Claims are bound by the rulings of the United States Court of Appeals for the Second Circuit and the Eastern District of New York on the same important issue of Federal Claims Court subject matter jurisdiction concerning an agreement made with the United States arising outside the criminal context and civil in nature. [1]

2. Whether the Circuit Courts have been erroneously interpreting the Tucker Act 28 U.S.C. §1491 as to the issue of whether the United States Court of Federal Claims has subject matter jurisdiction over agreements with the United States for services that arise predominately in the civil context.

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[1]The Second Circuit decision, which was remanded to the Eastern District of New York, which was not appealed from, determined that the agreement was civil in nature arising outside of the criminal context. In lieu of an appeal, from either the Second Circuit decision or the decision of Judge Platt of the Eastern District of New York, the Government commenced a civil action to enforce the agreement and Pappas asserted a counterclaim. When the Government voluntarily dismissed their claim the case was transferred to the Federal Claims Court because the amount involved was in excess of $10,000. The Federal Claims Court decision, affirmed by the Court of Appeals essentially overruled the decisions of the Eastern District of New York (the decision of Judge Platt finding it a civil contract and the decision of Judge Seybert denying the Government's motion to dismiss and transferring the case to the Court of Claims) and implicitly overruled the Second Circuit decision.

3. Whether Petitioner is entitled to compensation based on the value of the services rendered to the government i.e., quantum meruit, despite the fact that the consideration promised to Petitioner by the Respondent was sovereign in nature, if the consideration furnished by Petitioner was civil in nature.

PARTIES TO THE PROCEEDINGS

Petitioner, Dennis J. Pappas, was the plaintiff-appellant below and is referred to as "Petitioner" and/or "Pappas" herein. Respondent, United States, was the defendant-appellee below, and is referred to as "Respondent" and/or "United States" or the "Government" herein.[2]

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[2]Initially the case was instituted by the United States in the Eastern District of New York against Pappas who as the defendant asserted a counterclaim against the United States arising out of the identical set of facts and circumstances. Thereafter the United States voluntarily dismissed their claim and the counterclaim remained. The case was thereafter transferred to the Court of Federal claims due to the fact that the counterclaim exceeded the jurisdictional limit. Petitioner was directed to change the caption to reflect Pappas as the Plaintiff and the United States as the Respondent.

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit published at 2006 WL 618793. (App. 1a).

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is annexed hereto and reported at 2006 WL 618793. (App. 1a). The United States Court of Appeals for the Federal Circuit affirmed the decision by the United States Court of Federal Claims entered on June 8, 2005, which granted Respondent's motion to dismiss for lack of subject matter jurisdiction. The United States Court of Federal Claims' decision is annexed hereto and reported at 66 Fed. Ct. 1 (Fed Cl. 2005). (App. 4a). The joint appendix before the United States Court of Appeals for the Federal Circuit is cited as JA.[3]

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[3]There were two joint appendices filed in the court below, a confidential appendix and a non-confidential appendix. This brief refers to the confidential appendix.

JURISDICTION

The United States Court of Appeals for the Federal Circuit issued its decision on March 9, 2006 (App. 1a). This Petition is timely filed within ninety (90) days of the United States Court of Appeals for the Federal Circuit decision which affirms the decision of the United States Court of Federal Claims. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Tucker Act, 28 U.S.C. §1491 (2000). (The entire statute is set forth at App. 153a). The pertinent provision of the Tucker Act, 28 U.S.C. §1491(a)(1) provides: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort.

The Classified Information Procedures Act ("CIPA") 18 U.S.C. App. 3 (1994). (App. 156a).

STATEMENT OF THE CASE

The Court of Federal Claims had subject matter jurisdiction over this civil action pursuant to 28 U.S.C. §1491(a)(1). The appeal to the United States Court of Appeals for the Federal Circuit arose out of a breach of an agreement (hereinafter referred to as the "Agreement") between Petitioner, Dennis J. Pappas and Respondent, Uni ed States.[4] By Order dated March 9, 2006, the Court of Appeals for the Federal Circuit affirmed the June 8, 2005 decision of the United States Court of Claims which dismissed petitioner's Complaint for lack of subject matter jurisdiction. (App. 1a-23a). In 1993, at the Respondent's proposal, Petitioner entered into an Agreement to provide electrical services to the United States concerning national security. In exchange for these services the United States agreed to abandon a criminal investigation against Petitioner that was unrelated to the electrical services the United States was contracting for. Petitioner fulfilled his obligations under the Agreement. Respondent breached the Agreement and obtained an indictment against Petitioner. (JA 94-123).

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[4]The United States originally brought this action in the United States District Court for the Eastern District of New York. Petitioner's claim for breach of the Agreement was initially set forth as a counterclaim in response to Respondent's civil action for breach of the same Agreement. After Respondent voluntarily withdrew its action, Petitioner was directed to commence his own action for breach of contract.

In March of 1996, by order of the District Court for the Eastern District of New York, (Platt) restrictions were imposed upon Petitioner and his defense counsel with respect to disclosure to classified information. The United States Court of Appeals for the Second Circuit held that "to the extent that appeal challenges the prohibition on disclosure of previously acquired information, the case is remanded" to the District Court to "consider whether a prohibition grounded on a contract claim may be entered within the pending criminal case or requires initiation of a civil suit, referable to the same district judge as a related case." United States v. Pappas, 94 F.3d 795, 802 (2d Cir. 1996) (App. 55a). The Government did not appeal the decision.

On October 15, 1996, in accordance with the oral order of the Eastern District of New York, (Platt) that this is a civil contract (App. 145a) and the decision of the Second Circuit, the Respondent instituted a civil action against Petitioner in the Eastern District of New York pursuant to Title 28 U.S.C. §1345, invoking the Agreement and sought both a preliminary and permanent injunction prohibiting Petitioner Pappas from revealing his dealings with the Respondent. The civil action was stayed pending resolution of the criminal matter. (App. 139a-140a)

Petitioner, in answering the civil complaint, counterclaimed, alleging that the Respondent had breached the terms of the agreement when it indicted him and sought, among other things, money damages. (JA 27-75).

Thereafter, Respondent voluntarily dismissed its claims against the Petitioner and subsequently moved to dismiss Pappas' counterclaim for lack of subject matter jurisdiction. By Memorandum of Order, the Honorable Joanna Seybert, United States District Judge for the Eastern District of New York denied the motion to dismiss and with only the counterclaim remaining before it, ordered that the civil case be transferred to the United States Court of Federal Claims because the damages sought were for $10,000,000, beyond the jurisdictional limit of the Court. (App. 32a) The Government did not appeal that decision.

Thereafter, Petitioner was directed to commence a civil action against Respondent in the Court of Federal Claims for breach of the Agreement, changing the caption from the counterclaiming defendant to a plaintiff. On June 8, 2005, the Federal Claims Court held that the complaint should be dismissed for lack of subject matter jurisdiction (JA 3-14). On or about July 28, 2005 pursuant to the provisions of 28 U.S.C. §1295(a)(3) 2000, Petitioner timely appealed the order to the United States Court of Appeals for the Federal Circuit. By Order dated March 9, 2006, the United States Court of Appeals for the Federal Circuit affirmed the Order of the United States Court of Federal Claims. (App. 1a).

STATEMENT OF FACTS

Petitioner, Dennis J. Pappas, was approached by counter-intelligence agents in March of 1993 with an offer to enter into an agreement concerning national security with the United States by which Petitioner was to provide electrical wiring for wire tapping by the United States government. (JA 73-76). At the time the Agreement was entered into, there were no criminal charges pending against Petitioner. Petitioner was never a witness to any criminal trial against a third party or to any grand jury investigating any third party. In exchange for Petitioner's services, the United States promised Petitioner that he would not be indicted for any past criminal acts that were unrelated to the electrical services Petitioner was providing to the Government (the "Agreement"). Petitioner fulfilled his obligations under the Agreement and the Respondent violated the terms of the Agreement and obtained an indictment against Petitioner for racketeering and Internal Revenue Code violations. (JA 94-123). Petitioner was never compensated for his services.

Thereafter, in January or February of 1996, during a 40 month pre-trial incarceration, Petitioner allegedly spoke to third parties regarding the agreement he entered into and the work he performed for the Respondent. (JA 267). The Respondent moved for protective order pursuant to the Classified Information Procedure Act ("CIPA") (App. 157a) to prohibit Petitioner from making any disclosures concerning the agreement. (JA 269). The District Court granted the Respondent's application for a protective order and on appeal, the Second

Circuit remanded the case back to the District Court to determine "whether a prohibition grounded on a contract claim may be entered within a pending criminal case or requires initiation of a civil suit, referable to the same district judge as a related case." United States v. Pappas, 94 F.3d 795, 802 (2d Cir. 1996) (App. 55a) which decision was not appealed by the United States.

In a hearing held November 22, 1996, the Eastern District of New York stated "This is a civil contract, according to the – the implication by the Court of Appeals is that it's a civil contract. They want it enforceable. Not as a regulatory matter but between two parties who made a contract." (App. 145a). In compliance with Judge Platt's order, on October 15, 1996, the United States instituted their civil action against Pappas acknowledging a civil cause of action existed, seeking both a preliminary and permanent injunction prohibiting Pappas from revealing his dealings with the Government. (JA 267). In his answer, Pappas asserted a counterclaim against the United States averring that the Government had breached the terms of the very same agreement when it indicted him, sought damages in the sum of $10,000,000. (JA 27-75).

Thereafter, on March 26, 1999 due to the fact that Pappas accepted a plea agreement in connection with the charges against him, the Government voluntarily dismissed its claims against Pappas in the civil matter and on April 21, 1999 the Eastern District of New York ordered the claims of the United States dismissed.

The Government thereafter made a motion to dismiss Petitioner's counterclaim. The District Court denied the motion to dismiss stating "the court considers the plaintiff properly subject to effective and appropriate counterclaims brought by the defendant, including the instant counterclaim." (App. 36a). But, due to the fact that only the counterclaim remained, the Eastern District of New York transferred the case to the United States Court of Federal Claims because the counterclaim sought damages in excess of their jurisdictional limit. (App. 36a-37a).

The factual record clearly demonstrates that an agreement existed between the parties that arose outside the criminal context and that Respondent breached the terms of the agreement. The record further demonstrates that Petitioner was never compensated for his work and that the case was properly before the Federal Court of Claims and Petitioner is entitled to damages.

REASONS FOR GRANTING THE WRIT CIRCUIT CONFLICT AND ISSUES OF IMPORTANCE

This case is unique and poses an important question concerning whether the United States Court of Appeals for the Federal Circuit can essentially overrule and ignore the findings of the United States Court of Appeals for the Second Circuit and the Eastern District of New York on the same facts concerning the important issue of subject matter jurisdiction over an agreement with the United States. In addition, this case poses an

important question concerning whether the courts have been misinterpreting the Tucker Act and erroneously dismissing cases involving a breach of contract with the government. In this case, the Court of Appeals' decision in affirming the decision of the United States Court of Federal Claims is in direct conflict with the decisions of the Court of Appeals for the Second Circuit and the Eastern District of New York in a crucial way leaving the Petitioner and all private persons similarly situated without a remedy, involving an important issue that requires resolution by this Court.

In this case, the Respondent indisputably breached the civil Agreement that was made outside of a criminal proceeding, as was determined by the Second Circuit in remanding the decision to the Eastern District Court of New York, which Court found the agreement to be made outside of a criminal proceeding. (App. 55a, 145a, 36a). Yet the Court of Appeals for the Federal Circuit affirmed the decision of the Court of Claims which held that the Court lacked subject matter jurisdiction because the agreement arose in a criminal context, leaving Petitioner without a remedy. (App. 22a). That holding is in direct conflict with and disregarded the decisions of the Eastern District of New York and implicitly the Court of Appeals for the Second Circuit which found that the very same agreement arose outside of the criminal context and directed that a civil action to enforce the agreement be commenced. (App. 55a, 145a, 36a).

This case also raises the important issue of how the breach of agreements with the United States are to be determined under 28 U.S.C. §1491, the Tucker Act. The decision of the Court of Appeals for the Federal Circuit, affirming the decision of the United States Court of Claims is unsupported by and is inconsistent with the decision of the United States Court of Appeals for the Second Circuit, the Eastern District of New York and the Tucker Act itself. Accordingly, this Court should grant this Petition, clarify the law and reverse.

POINT I

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT CONCERNING WHETHER A COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND A COURT OF FEDERAL CLAIMS CAN IGNORE A RULING OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND RULINGS FROM THE EASTERN DISTRICT OF NEW YORK ON THE SAME IMPORTANT ISSUE CONCERNING SUBJECT MATTER JURISDICTION

In United States of America v. Pappas, 94 F.3d 795 (2d Cir. 1996), the Second Circuit, finding that the Classified Information Procedures Act ("CIPA") did not apply,[5] directed that it was up to

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[5]The appeal to the Second Circuit involved an order which imposed restrictions upon Pappas and his defense counsel with respect to disclosure of classified information. The Second Circuit considered the Respondent's assertions that Classified Information Procedure Act ("CIPA"), 18 U.S.C. App. 3 (1994) was applicable and found it did not apply to such

"the District Court to consider whether a prohibition grounded on a contract claim may be entered within the pending criminal case or requires an initiation of a civil suit referable to the same district judge as a related case." (App. 55a). The Eastern District of New York (Platt) interpreted the Second Circuit's decision and held that the issue should be addressed in a separate civil action which it stayed pending the resolution of the criminal matter (App. 139a). Thereafter, the Eastern District of New York (Seybert) determined that the breach of Agreement counterclaim was properly before the Court and transferred the case to the Federal Court of Claims because the counterclaim was seeking damages beyond the jurisdictional limit. (App. 36a). The United States accepted the decision and initiated a civil suit based on the Agreement.

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previously acquired information. (App. 52a). The Second Circuit determined that CIPA appears to have no application to Pappas since the information at issue was not disclosed to him in a criminal case. (App. 52a).

> "....though the prohibition of public disclosure of previously acquired information may not be supported by CIPA, it may nonetheless be supported under ordinary principals of contract law. Preliminary we note that the contract issues are governed by federal common law. Whatever the role of state law might be when the United States contracts and purely proprietary capacity there can be no doubt that a contract for services on matters involving national security is governed by federal law."

United States v. Pappas, 94 F.3d 795 (emphasis added). (App. 39a)

In direct conflict with the Second Circuit decision, and with the two decisions of the Eastern District of New York, finding remedies lie outside the criminal proceeding, the United States Court of Appeals for the Federal Circuit affirmed the decision of the Court of Claims and dismissed Petitioner's breach of contract claim, finding "this court does not possess jurisdiction to grant the injunctive relief, specific performance, or monetary damages sought by the plaintiff. Remedies, if any remain, are in the jurisdiction of the court which presided over the criminal prosecution and plea agreement." (App. 22a). This case poses a unique conflict among the courts and warrants review.

The District Court for the Eastern District of New York (Platt) stated:

> "I have indicated I am not going to proceed with the civil action, at least not until we've dealt with these hearings...
>
> ...
>
> This is a civil contract according to the implication by the Court of Appeals is that it's a civil contract. They want it enforceable. Not as a regulatory matter but between two parties who made a contract."

(App. 155a). In lieu of an appeal, the Respondent instituted a civil action against Petitioner. (JA 267). In his answer, Petitioner counterclaimed against the United States averring that the Government had

breached the very same agreement they sued on when they indicated him on unrelated matters. The Eastern District of New York (Seybert) denied the Government's motion to dismiss and found the Government to be subject to appropriate counterclaims "arising from the same nucleus of facts," quoting United States v. National City Bank of New York, 83 F.2d 236, 238 (2d Cir. 1936):

> "If a sovereign state goes into court seeking its assistance it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect to a set-off or counterclaim."

(App. 35a). Justice Seybert held that "by launching the original action, filing suit in this Court and acting as a master of the claim, the plaintiff surrendered its right to claim sovereign immunity" and held plaintiff to be "properly subject to the effective and appropriate counterclaims brought by the defendant, including the instant counterclaim." (emphasis added) (App. 36a). Judge Seybert's decision was not appealed by the Government.

"When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court and disposed of by its decree is considered finally settled. The Circuit Court is bound by the decree as law of the case and cannot vary it." United States v. Tuffanelli, 138 F.2d 981, 984 (7th Cir. 1943) quoting Re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S. Ct. 291, 293, 40 L. Ed. 414. The doctrine of law of the case "posits that

when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" quoting Arizona v. California, 460 U.S. 605, 618 103 S. Ct. 1382, 1391 75 L. Ed. 2d 318 (1983) (Dictum) (1983). Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 815 108 S. Ct. 2166 (1980). The doctrine applies to decisions of a coordinate court. Id. at 816. The "policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law." Id.[6]

The Court of Appeals for the Second Circuit together with the Federal District Court for the Eastern District (Platt and Seybert) found that the Agreement did not pertain solely to sovereign issues on criminal matters and the Court had subject matter jurisdiction. Therefore, it is respectfully submitted that this Court should grant Petitioner's Petition for a Writ of Certiorari because the decision of the Court of Appeals for the Second Circuit, finding that CIPA did not apply and directing that the Eastern District of New York determined the issue of subject matter jurisdiction, which was found to be proper, is in direct conflict with the decision of the United States Court of Appeals for the Federal Circuit on the same important issue. The Federal court of Claims and the Court of Appeals for the Federal Circuit cannot ignore and should be bound

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[6]The Christianson court noted that a court has the power to revisit prior decisions of coordinate courts, but should do so in extraordinary circumstance such as where the initial decision was "clearly erroneous and would work a manifest injustice." Id. at 817 quoting Arizona v. California.

by the findings of the Second Circuit and the District Court for the Eastern District of New York.

POINT II

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE IMPORTANT ISSUE CONCERNING WHETHER THE COURT OF CLAIMS AND THE COURT OF APPEALS HAVE BEEN MISINTERPRETING THE TUCKER ACT AS TO THE ISSUE OF SUBJECT MATTER JURISDICTION OVER BREACH OF AGREEMENTS WITH THE UNITED STATES

The Agreement at issue is clearly one that is within the subject matter jurisdiction of the Federal Claims Court pursuant to the Tucker Act 28 U.S.C. §1491(a)(1). This Agreement involved an express contract for services where the United States purchased electrical services from Petitioner at a time where there was no plea agreement and no criminal action pending. The Tucker Act confers jurisdiction upon the Court of Federal Claims over specified actions brought against the United States:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States...upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. §1491(a)(1),

In this case, Petitioner brought an action for breach of an express contract. The very Court which denied Petitioner subject matter jurisdiction on a breach of contract claim granted another plaintiff jurisdiction in the case of Englewood Terrace Limited Partnership v. The United States, 61 Fed. Cl. 583 (Fed. Cl. 2004). In that case, the government argued that the court lacked subject matter jurisdiction over the breach of contract claim arguing that the plaintiff must establish some substantive provision of law, regulation or the constitution which can be construed fairly as mandating compensation. The Federal Court of Claims held:

> "There are several problems with this argument. In the first place the Government seems to misunderstand the Tucker Act's waiver of sovereign immunity. While it is true that the Tucker Act does not itself create a substantive right to recover money damages, a plaintiff does not need an act of Congress to create such a right. Rights to money damages may be created by the Executive branch, by simply entering into a contract. See 28 USC §1491(a)(1) (our Court has jurisdiction over claims found "upon any express or implied contract with the United States; United States v. Testan, 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976).
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> . . .

> And unlike situations in which jurisdiction is based on law or regulation, the contract need not explicitly state that money damages are an available remedy. **United States v. Winstar Corp., 518 U.S. 839, 885, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996)** (plurality opn.) (holding **"damages are always the default remedy for breach of contract")."**

Englewood Terrace Limited Partnership at 588. In this case there is an express contract which grants the Federal Court of Claims subject matter jurisdiction under the Tucker Act.

Further, this case is unique and distinguishable from the cases erroneously relied upon by the Court of Federal Claims and the Court of Appeals in finding lack of subject matter jurisdiction. None of the cases cited involved an action for breach of an agreement with the government where the United States initiated the civil action to enforce the provisions contained in the very same agreement. The Court of Appeals for the Federal Claims in affirming the decision of the Court of Claims found that the Court lacked subject matter jurisdiction based essentially upon the case of Kania v. United States, 650 F.2d 264, 265 (Ct. Cl. 1981), cert. den., 454 U.S. 895 (1981), and its progeny's interpretation of the Tucker Act 28 U.S.C. §1491(a)(1). (App. 4a-23a).

The law is unclear as to the correct interpretation of the Tucker Act. In United States v.

Mitchell, 463 U.S. 206, 212 (1983) (quoting U.S. v. Testan, 424 U.S. 392, 398-99 (1976)), the United States Supreme Court found that although the Tucker Act confers jurisdiction on the Court of Federal Claims, it does not create any substantive right enforceable against the United States for money damages. But, the United States v. Testan, 424 U.S. 392, 400 (1976) case did not involve a breach of contract case where the government initiated the action. In Tippett v. United States, 185 F.3d 1250, 125 (Fed. Cir. 1999), the Court of Appeals for the Federal Circuit seemed to modify United States v. Mitchell and added "when a contract is not involved to invoke jurisdiction under the Tucker Act, a plaintiff must identify a constitutional provision, a statute, or a regulation that provides a substantive right to damages (citation omitted). Therefore the Tucker Act does provide subject matter jurisdiction where there is a contract, as in this case.

Moreover, the United States Supreme Court held that under the Tucker Act, "damages are available for breach of contract, even where the parties did not specify a remedy." United States v. Winstar Corp., 518 U.S. 839, 885 (1996). In Winstar, the United States Supreme Court exercised subject matter jurisdiction finding that "damages are always the default remedy for breach of contract." Id. at 885, 116 S. Ct. 2432 (plurality opinion) (citing Restatement (Second) of Contracts §346, comment a (1981). The Winstar, the claim arose from a contract with the United States which presumably was entered into in its sovereign capacity that made no express provision for damages in the event of a breach.

> Every breach of contract give the injured party a right to damage against the party in breach unless the parties...by agreement vary the rules. Id. at 886.

In this case, the decision of the Court of Appeals of the Federal Court, in affirming the Federal Court, erroneously relied on Kania and its progeny as a proper interpretation of the Tucker Act.

> The statutory language draws no distinction between contracts which the United States is party as a sovereign and those to which it is a party as a proprietor. Moreover, neither the Kania opinion nor the United States in this proceeding points to legislative authority for that distinction...the sovereign/proprietor distinction is based upon a supposition of what congress 'had in mind' rather than what it actually wrote into the statutes." Kania, 650 F.2d at 268.

United States v. Zajanckauskas, 346 F. Supp. 2d 251, 257-58 (D. Mass. 2003).[7] The Kania court interpreted the Tucker Act as meaning congress "had in mind as the principal class of case in which it

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[7]The Zajanckauskas, case involves the Little Tucker Act which permits the United States to be sued in the District Court under contract principles for damages not greater than $10,000. The Court in a footnote states that the substance of the Tucker Act is identical to that of the little Tucker Act and should be construed as equivalents. Id. at 255.

consented to be sued the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands and services, transactions such as private parties, individuals or corporations also engage in among themselves. Id. at 268.

The Zajanckauskas case pointed out that the Tucker Act does not differentiate between a contract that is silent as to the remedy for breach and one that "clearly and unmistakably subjects to the government to monetary liability for any breach":

> "In Kania, however, the United States Court of Claims, by some stroke of insight into congressional intent that is not available to this Court, found that only the latter kind of contract is enforceable under the Tucker Act. Not only is that distinction unsupported by the statutory language but also it is inconsistent with other provisions of the Tucker Acts. Those Acts explicitly contemplate that 'unliquidated damages' may be assessed against the United States. 28 USC §§ 1346(a)(2), 1491(a)....Given such a broad waiver of immunity, it is incongruous to read the Tucker Act as providing subject matter jurisdiction to the respective courts in breach of contract actions in which the United States is acting in its capacity is a sovereign only when damages are spelled out in the contract."

Id. at 258. In Zajanckauskas, the District Court determined that because the immunity agreement did not arise in the context of the criminal justice system it is governed by civil contract principals under which the default remedy is money damages. The Court denied plaintiff's motion to dismiss the defendant's amended counterclaim.[8] These same principals should be applicable to the instant case.

Further, another reason to find a misapplication of the Tucker Act in this case, is the District Court for the Eastern District of New York's (Seybert) rejection of the sovereign immunity argument citing United States v. National City Bank of New York, 83 F.2d 236, 238 (2d Cir. 1936):

> "It would be patently unjust to allow the plaintiff to bring its breach of contract claim, while disallowing the defendant's breach of contract counterclaim which arises from the same set of facts and occurrences (JA 32).

Order of the Honorable Joanna Seybert (App. 36a)

Both the Federal Court of Claims and the United States Court of Appeals for the Federal Circuit ignored the determinations of the Second Circuit Court of Appeals and the Eastern District of New York, as well as the United States'

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[8]The Zajanckauskas court states it was bound by the criminal/civil distinctions because the circuit court to which that court is bound to defer, has found that said distinction should apply.

acknowledgment that the Agreement was civil, and erroneously determined that the Government was immune from Civil liability for its breach of the contract it made with the Petitioner.

Moreover, the Agreement Petitioner made with Respondent was clearly not one made to "facilitate the flow of a case through the criminal justice system." Drakes v. United States, 28 Fed. Cl. 190, 194 (1993). The logic behind Kania and its progeny's rationale is that plea agreements are not contracts in a civil sense, but a device used by criminal courts to facilitate the flow of cases through the criminal justice system. Id. at 194. Therefore, the reasoning that remedies for breach of plea agreements are found within the criminal justice system clearly do not apply here or to any similar agreements made with the United States. The intent of the Agreement was to provide electrical services from Petitioner and did not have anything to do with the flow of a case through the system.

Moreover, in the area of government contracts, agreements that are part civil and part criminal may be governed by the presumption concerning availability of damages in civil cases. Sanders v. U.S., 252 F.3d 1329, 1334 (Fed. Cir. 2001).

In sum, courts have been misinterpreting the Tucker Act and this case vastly differs from the cases relied upon by the Court of Appeals for the Federal Circuit and the Court of Federal Claims and the Respondent. While the consideration for the agreement was immunity from prosecution, the crux

of the agreement was in essence one entered outside the criminal context for electrical services to be performed by Pappas. The Court of Appeals for the Federal Circuit erroneously concluded that the Respondent is protected from jurisdiction under the principle of sovereign immunity, leaving Petitioner without a remedy.

The interpretation of the Tucker Act should be one which compensates a party to a contract that provides services to the United States in a civil context. The fact that the services provided to the government was done in return for immunity from prosecution does not change the nature of the agreement from a civil and to a criminal one. Clearly, in this case, the Federal Claims Court had subject matter jurisdiction pursuant to the Tucker Act 28 U.S.C. 1491 and it is respectfully submitted this Court should grant Petitioner's Petition for a Writ of Certiorari, clarify the law and reverse the decision of the Court of Appeals.

POINT III

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE IMPORTANT ISSUE CONCERNING WHETHER A PARTY IS ENTITLED TO DAMAGES IN QUANTUM MERUIT WHEN THE GOVERNMENT BREACHES AN AGREEMENT FOR SERVICES

Actions for breach of contract entered into with the United States are properly brought in the Federal Claims Court pursuant to the Tucker Act and should be governed by civil contract principles

entitling a petitioner to monetary damages. In this unique set of circumstances, Petitioner should be entitled to quantum meruit damages for Respondent's breach of the Agreement. The Petitioner performed electrical services the Government requested and received no compensation. The compensation proffered by the Respondent was illusory since the Respondent, obtained an indictment against Petitioner, despite a promise not to, as the consideration for Petitioner performing services under the agreement.

The Court of Federal Claims has used quantum meruit as a basis for awarding the Plaintiff the fair value of what is supplied to the Government. Perri v. United States, 340 F.3d 1337, 1343 (Fed. Cir. 2003). It would be unfair to permit the government to retain the benefits of the bargain it had made with Petitioner without a payment. Petitioner should be entitled be awarded the fair value of what it supplied to the government.

Recovery in quantum meruit is based upon a contract implied in law. Perri v. United States, 340 F.3d 1337, 1343 (Fed. Cir. 2003). An exception to the rule that a Court of Federal Claims generally lacks jurisdiction over a contract implied in law arises in situations where plaintiff provides goods or services to the government pursuant to an express contract and the government refuses to pay for them because of defects in the contract that rendered it invalid or unenforceable. The rational for recovery was that it would be unfair to permit the Government to retain the benefits of the bargain it made without payment

of the fair value. Perri, citing Prestex Inc. v. United States, Ct. Cl. 620, 320 F.2d 367 (1963).

In United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986), the Court of Appeals explained that the contractor has been held to be entitled to payment on a quantum meruit basis for the value of the services rendered, "prior to the rescission of the contract for invalidity." In this case, it would be unfair to permit the Government to retain the benefits of the electrical services that Petitioner rendered without paying for them, when it rendered the contract unenforceable by indicting Petitioner.

It is respectfully submitted that this Court should grant Petitioner's Writ of Certiorari to resolve the important issue concerning whether a party is entitled to damages in quantum meruit when the government breaches an agreement for services where the consideration to be furnished by the government was sovereign in nature and the consideration furnished by the petitioner was civil in nature.

CONCLUSION

It is respectfully requested that this Court grant review to resolve the unique issues of importance concerning the conflict among the circuits on the important issues of subject matter jurisdiction over a breach of contract with the United States. The issue constantly arises as to whether the United States can be held liable for the breach of an agreement with private parties under the Tucker

Act and the Courts have been misinterpreting the Tucker Act and erroneously dismissing actions finding lack of subject matter jurisdiction over this important question. This Court should grant this Petition, clarify the law and reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/ Edward K. Blodnick
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APPENDIX

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent, it is a public record.

United States Court of Appeals for the Federal Circuit

[ENTERED: MARCH 9, 2006]

05-5151

DENNIS J. PAPPAS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 05-CV-219

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (SCHALL, BRYSON, and DYK, Circuit Judges.

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAR - 9 2006 /s/ Jan Horbaly/JB
Jan Horbaly, Clerk

ISSUED AS A MANDATE: MAY 2 2006

In the United States Court of Federal Claims

[ENTERED: JUNE 8, 2005]

No. 05-219 C

DENNIS J. PAPPAS,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion, filed June 8, 2005, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant and the complaint is dismissed. Each party shall bear its own costs.

Brian Bishop
Clerk of Court

June 8, 2005

By: /s/_____
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $255.00.

In the United States Court of Federal Claims

No. 05-219C
Filed: June 8, 2005[1]
Reissued for Publication July 11, 2005

DENNIS J. PAPPAS,

Plaintiff,

v.

Subject Matter Jurisdiction; Motion to Dismiss.

UNITED STATES,

Defendant.

RICHARD A. MASTROCOLA, Blodnick, Gordon, Fletcher & Sibell, P.C., Westbury, New York, for the plaintiff.

THOMAS A. MCFARLAND, Assistant United States Attorney for the Eastern District of New York; **ROSLYNN R. MAUSKOPF,** United States Attorney for the Eastern District of New York, Central Islip, NY; **PETER D. KEISLER,** Assistant Attorney General, Department of Justice, Washington, D.C., for the defendant.

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[1] This opinion was issued under seal on June 8, 2005. The parties were instructed to identify material which should be redacted. The original opinion is reissued with the resulting redactions indicated by the designation, "[deleted]."

OPINION

HORN, J.

Dennis J. Pappas, plaintiff, brings this action against the government seeking $10,000,000.00 in damages for allegedly breaching an agreement not to prosecute the plaintiff. The government has moved to dismiss the action for lack of subject matter jurisdiction. The facts, construed in a light most favorable to the non-moving party, Mr. Pappas, are as follows.

FINDINGS OF FACT

According to the complaint, [deleted] Dennis J. Pappas, the plaintiff, entered into an agreement with the defendant United States (the Agreement) to provide services to the government, while maintaining the government's confidentiality. In exchange, the plaintiff alleges that the government promised to abandon an ongoing investigation concerning criminal charges against Mr. Pappas and not to indict him for criminal wrongdoing. According to Mr. Pappas, [deleted] he had completed the services required in the alleged Agreement.

Also, according to Mr. Pappas, in April, 1995, the government allegedly violated the Agreement by indicting, arresting, and arraigning him for racketeering and Internal Revenue Code violations. Mr. Pappas remained in pre-trial custody. He was released in November of 1998 after being sentenced according to a plea agreement in which he pled guilty to racketeering and tax evasion. In the plea

agreement, among other considerations, Mr. Pappas agreed to waive his right to appeal the criminal conviction or to challenge the sentence. [deleted]

After the plaintiff had expressed an intention to publicly reveal information encompassed within the Agreement, the United States, citing a non-disclosure agreement, obtained a protective order prohibiting Mr. Pappas from such disclosures. Mr. Pappas subsequently met with reporters, after which the United States District Court for the Eastern District of New York issued a supplemental protective order. The plaintiff appealed to the United States Court of Appeals for the Second Circuit. The Circuit Court dismissed the appeal in part and remanded to the trial court to decide if the Agreement/contract between the government and Mr. Pappas entitled the government to a protective order barring disclosure of information received from the government prior to the litigation and already made public and whether the issue should be decided as part of the pending criminal case or in a civil suit. United States v. Pappas, 94 F.3d 795, 798, 802 (2d Cir. 1996). Upon remand, the District Court judge directed that a civil proceeding be filed.

During Mr. Pappas' pre-trial incarceration, the government initiated the civil action, under seal, in the United States District Court for the Eastern District of New York against Mr. Pappas [deleted]. The government sought injunctive relief prohibiting Mr. Pappas from discussing his dealings with the government and sought specific performance of the Agreement. The civil action was stayed pending resolution of Mr. Pappas' criminal case. After his

plea agreement, conviction, and release, Mr. Pappas responded to the government's civil action by filing a counterclaim in District Court seeking breach of contract damages of $10,000,000.00, because, according to the plaintiff, the government allegedly had breached the Agreement by indicting him. In 1999, the government voluntarily dismissed its claim in the civil action in District Court in the Eastern District of New York, leaving only Mr. Pappas' breach of contract claim. The United States District Court for the Eastern District of New York transferred the plaintiffs remaining breach of contract claim to this court.

The plaintiff filed a new complaint in this court in accordance with this court's rules. According to Mr. Pappas, in this court he is seeking specific monetary damages, claiming that any equitable remedy to enjoin the government from criminal prosecution has been rendered moot because he has already been convicted, sentenced, imprisoned, and subjected to post release supervision. The government has filed a motion to dismiss the action for lack of subject matter jurisdiction, to which the plaintiff has filed a response in opposition.

DISCUSSION

Subject matter jurisdiction may be challenged at anytime by the parties, by the court sua sponte, and even on appeal. Fanning, Phillips, Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998) (quoting Booth v. United States, 990 F.2d 617, 620 (Fed. Cir.), reh'g denied (1993)); United States v. Newport News Shipbuilding and Dry Dock Co., 933 F.2d 996, 998

n.1 (Fed. Cir. 1991). A plaintiff must establish jurisdiction by a preponderance of the evidence. Reynolds v. Army and Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); Thomas v. United States, 56 Fed. Cl. 112, 115 (2003); Martinez v. United States, 48 Fed. Cl. 851, 857 (2001), aff'd in part, 281 F.3d 1376 (Fed. Cir.), reh'g denied (2002); Bowen v. United States, 49 Fed. Cl. 673, 675 (2001), aff'd, 292 F.3d 1383 (Fed. Cir. 2002); Vanalco, Inc. v. United States, 48 Fed. Cl. 68, 73 (2000); Alaska v. United States, 32 Fed. Cl. 689, 695 (1995), appeal dismissed, 86 F.3d 1178 (Fed. Cir. 1996) (table). When construing the pleadings pursuant to a motion to dismiss, the court should grant the motion only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999) (quoting Conley v. Gibson, 355 U.S. 41, 46 (1957)); Brubaker Amusement Co. v. United States, 304 F.3d 1349, 1355 (Fed. Cir. 2002), cert. denied sub nom. Penn Triple S v. United States, 538 U.S. 921 (2003); Leider v. United States, 301 F.3d 1290, 1295 (Fed. Cir.), reh'g and reh'g en banc denied (2002), cert. denied, 538 U.S. 978 (2003); Conti v. United States, 291 F.3d 1334, 1338 (Fed. Cir.), reh'g en banc denied (2002), cert. denied, 537 U.S. 1112 (2003); Consol. Edison Co. v. O'Leary, 117 F.3d 538, 542 (Fed. Cir. 1997), cert. denied sub nom. Consol. Edison Co. v. Pena, 522 U.S. 1108 (1998); see also New Valley Corp. v. United States, 119 F.3d 1576, 1579 (Fed. Cir.), reh'g denied, and reh'g en banc declined (1997); Highland Falls-Fort Montgomery Cent. School Dist. v. United States, 48 F.3d 1166, 1169 (Fed. Cir.), cert. denied, 516 U.S. 820 (1995);

Hamlet v. United States, 873 F.2d 1414, 1416 (Fed. Cir. 1989); W.R. Cooper Gen. Contractor, Inc. v. United States, 843 F.2d 1362, 1364 (Fed. Cir. 1988) ("When the facts alleged in the complaint reveal 'any possible basis on which the non-movant might prevail, the motion must be denied.'"); RCS Enters., Inc. v. United States, 46 Fed. Cl. 509, 513 (2000).

Pursuant to RCFC 8(a)(1) and Rule 8(a)(1) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends." RCFC 8(a)(1). However, "[determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiffs claim, independent of any defense that may be interposed." Holley v. United States, 124 F.3d 1462, 1465 (Fed. Cir.), reh'g denied (1997) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983); Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding a motion to dismiss based on a lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), Conley v. Gibson,

355 U.S. at 45-46; Boise Cascade Corp. v. United States, 296 F.3d 1339, 1343 (Fed. Cir. 2002), cert. denied, 538 U.S. 906 (2003); Pixton v. B & B Plastics, Inc., 291 F.3d 1324, 1326 (Fed. Cir. 2002); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338 (Fed. Cir. 2001) (quoting New Valley Corp. v. United States, 119 F.3d at 1580), cert. denied, 535 U.S. 1096 (2002): Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000); Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998); Highland Falls-Fort Montgomery Cent. School Dist. v. United States, 48 F.3d at 1167 (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)); Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Hamlet v. United States, 873 F.2d at 1416; Ho v. United States, 49 Fed. Cl. 96, 100 (2001), aff'd, 30 Fed. Appx. 964 (Fed. Cir. 2002); Alaska v. United States, 32 Fed. Cl. at 695. If a defendant or the court challenges jurisdiction or plaintiffs claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); see also Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); Reynolds v. Army and Air Force Exch. Serv., 846 F.2d at 747; Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 404-05 (1994).

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491 (2000). The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States, (2) seeking a refund from a prior payment made to the government or (3) based on federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained. See United States v. Testan, 424 U.S. 392, 400, reh'g denied, 425 U.S. 957 (1976) (citing Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 605-06, 372 F.2d 1002, 1009 (1967)); see also Palmer v. United States, 168 F.3d 1310, 1314 (Fed. Cir. 1999); Stinson, Lyons & Bustamante, P.A. v. United States, 33 Fed. Cl. 474, 478 (1995), aff'd, 79 F.3d 136 (Fed. Cir. 1996). A waiver of traditional sovereign immunity cannot be implied but must be "unequivocally expressed." INS v. St. Cyr, 533 U.S. 289, 299 n.10 (2001); United States v. Nordic Village, Inc., 503 U.S. 30, 33 (1992); Ins. Co. of the West v. United States, 243 F.3d 1367, 1372 (Fed. Cir.), reh'g and reh'g en banc denied (2001); Saraco v. United States, 61 F.3d 863, 864 (Fed. Cir.

1995) (quoting United States v. King, 395 U.S. 1, 4 (1969)), cert. denied, 517 U.S. 1166 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims; "'it does not create any substantive right enforceable against the United States for money damages.'" United States v. Mitchell, 445 U.S. 535, 538 (quoting United States v. Testan, 424 U.S. at 398-99), reh'g denied, 446 U.S. 992 (1980); White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1372 (Fed. Cir. 2001), aff'd, 537 U.S. 465 (2003); Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001); New York Life Ins. Co. v. United States, 118 F.3d 1553, 1555-56 (Fed. Cir. 1997), cert. denied, 523 U.S. 1094 (1998); United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), cert. denied, 465 U.S. 1065 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. United States v. Mitchell, 445 U.S. at 538. In order for a claim to be successful, the plaintiff "must also demonstrate that the source of law relied upon 'can fairly be interpreted as mandating compensation by the federal government for the damages sustained.'" White Mountain Apache Tribe v. United States, 249 F.3d at 1372 (quoting United States v. Mitchell, 463 U.S. 206, 216-17 (1983)); United States v. Testan, 424 U.S. at 400; Tippett v. United States, 185 F.3d 1250, 1254 (Fed. Cir. 1999) ("[T]he plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the

United States.") (quoting James v. Caldera, 159 F.3d 573, 580 (Fed. Cir. 1998), reh'g denied (1999)); Doe v. United States, 100 F.3d 1576, 1579 (Fed. Cir. 1996), reh'g and reh'g en banc denied (1997); Eastport Steamship Corp. v. United States, 178 Ct. Cl. at 607, 372 F.2d at 1009.

The government contends that the Agreement in the present case does not give rise to a suit for money damages because the United States was acting in its sovereign capacity rather than as a government contractor in its dealings with Mr. Pappas. In support of this contention, the defendant initially cites the court to Kania v. United States, 227 Ct. Cl. 458, 650 F.2d 264, cert. denied, 454 U.S. 895 (1981). In Kania, the plaintiff brought an action for damages against the government for breaching an immunity agreement. Id. at 459-62, 650 F.2d at 265-66. The plaintiff agreed to testify before a grand jury against his past employer in exchange for a promise not to prosecute him for his activities while employed. Id. at 460-62,650 F.2d at 266. After testifying before the grand jury as agreed, the plaintiff was nevertheless indicted for his prior criminal activities Id. at 461-62, 650 F.2d at 266-67. The court dismissed the action for lack of subject matter jurisdiction, explaining that:

> The contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of the minds. The Congress

> undoubtedly had in mind as the principal class of contract case in which it consented to be sued, the instances where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.

Kania v. United States, 227 Ct. Cl. at 464, 650 F.2d at 268.

Similarly, in Sanders v. United States, 252 F.3d 1329, 1331 (Fed. Cir. 2001), the United States Court of Appeals for the Federal Circuit addressed an alleged breach of an agreement with a criminal defendant concerning his release on bail after trial. The Federal Circuit found that alleged breaches of plea agreements, which are entirely concerned with the conduct of the parties in a criminal case, do not normally give rise to claims for money damages, but for specific performance remedies. See id. at 1334-35 ("'[T]he only remedies available for breach of a plea agreement are enforcement of the agreement or affording the defendant an opportunity to withdraw the plea ....'") (quoting 1-95-CV-553-P1 v. 1-95-CV-553-D1, 75 F.3d 135, 136 (2d Cir. 1996)).

The Sanders court, however, acknowledged that a breach of an immunity agreement could support a claim for damages under the Tucker Act if a specific remedy was contemplated in the agreement. See id. at 1335. The Sanders court,

quoting and commenting on the Kania decision, wrote:

> That court did recognize that breach of such an agreement under some circumstances could support a damages claim under the Tucker Act:
>
> > [I]t [is] possible to make a binding contract subject to Tucker Act jurisdiction, creating a liability for breach of a plea bargaining agreement or one to grant immunity for giving testimony, or to protect a witness. But, in such case, the court would look for specific authority in the AUSA to make an agreement obligating the United States to pay money, and spelling out how in such a case the liability of the United States is to be determined.
>
> [Kania v. United States, 227 Ct. Cl. at 465, 650 F.2d] at 268 (emphasis added [by the Sanders court]). In other words, a claim for money damages for the alleged breach of such an agreement may not be maintained unless that agreement clearly and unmistakably subjects the government to monetary liability for any breach.

Sanders v. United States, 252 F.3d at 1335 (emphasis in original).

The decision in Houston v. United States, 60 Fed. Cl. 507 (2004), following Sanders and Kania, similarly described the relationship between the jurisdiction of the United States Court of Federal Claims and Federal District Court criminal proceedings. In Houston, the plaintiff sought money damages for an alleged breach by the government of a plea agreement. Id. at 509. In its decision to dismiss the action for lack of jurisdiction, the court emphasized the government's role as a sovereign power by noting that plea, immunity, and witness protection agreements are "the type of contract that the government makes in its sovereign capacity, since private parties cannot make agreements with criminal defendants regarding criminal matters." Id. at 511. The Houston court further noted:

> In general, courts have held that this Court [the Court of Federal Claims] does not have jurisdiction over cases in which the government acts in its sovereign capacity. . . . Without such specific authority, this Court has generally held that it does not possess subject matter jurisdiction over agreements made in the course of criminal proceedings, such as plea agreements, immunity agreements, and witness protection agreements.

Houston v. United States, 60 Fed. Cl. at 511 (citations omitted).

Similarly, in Drakes v. United States, 28 Fed. Cl. 190 (1993), the government specifically, and in writing, promised in a plea offer to protect the criminal defendant in return for his cooperation with the government in various criminal investigations. Threats were made to the defendant, and he requested release from jail for his protection, but was not released. After the defendant was injured while in jail, he was released. Id. at 191. The alleged breach of the plea agreement was dismissed by the court, which found that the government was not liable for damages resulting from the plea agreement, an act performed by the sovereign in its sovereign capacity and for which no waiver had been granted. See id. at 193.

In Silva v. United States, 51 Fed. Cl. 374, aff'd, 51 Fed. Appx. 12 (Fed. Cir. 2002), the government confiscated a number of exotic parrots. Mr. Silva subsequently pled guilty to the illegal importation of protected wildlife, but claimed breach of a breeding agreement between Silva and a private individual who became an informant for the government, and who Silva alleged had entered into the contract on behalf of the government. Id. at 375-76. The Silva court found that, assuming privity of contract with the government existed, which was by no means clear, the alleged agreement would have been for the purpose of an undercover law enforcement investigation of the illegal importation of wildlife. Id. at 377-78. Dismissing the complaint, the court held that: "[T]hese law enforcement operations are activities of the criminal justice system, activities that, without question, lie 'at the

heart of sovereign action.'" Id. at 377 (quoting Sadeghi v. United States, 46 Fed. Cl. 660, 662, appeal dismissed, 250 F.3d 762 (Fed. Cir. 2000) (table)).

Thus, pursuant to Kania and the line of cases which followed, Mr. Pappas or any other plaintiff cannot perfect jurisdiction in this court for a claim integrally related to a criminal proceeding unless it is clear that when the government entered into the agreement: (1) the government agents possessed the authority to bind the government to pay money and (2) specific monetary liability had been clearly intended as compensation by the parties in the event of a breach. See Kania v. United States, 227 Ct. Cl. at 465, 650 F.2d at 268.

In Bailey v. United States, this court found jurisdiction, unlike in the cases discussed above, over a claim for the alleged breach of an oral contract with the government. See Bailey v. United States, 54 Fed. Cl. 459 (2002), aff'd, Bailey v. United States, 94 Fed. Appx. 828 (Fed. Cir. 2004). Mr. Bailey, an attorney for a criminal defendant, asserted that he had entered into an oral contract to perform services for the government, separate from the plea agreement between the government and his client. The oral agreement was for Mr. Bailey to assist the government to repatriate foreign assets subject to forfeiture. See id. at 463-67. Mr. Bailey alleged that his compensation for performing the duties included in the oral contract was to derive from a stock asset of the criminal defendant's rather than from monetary compensation. See id. Mr. Bailey argued that he was entitled to be

compensated for his services by his receipt of the actual stock, which was deposited into his Swiss bank account, including any losses or profits derived from the stock, not by a judicially determined amount. See id. When finding jurisdiction, this court explained that the claim before the court was for breach of a contract between Mr. Bailey and the government, which called for services on Mr. Bailey's part, the scope of which, asset maintenance, liquidation and repatriation were considered unusual and beyond normal defense counsel duties. A key, credible, senior government witness at trial confirmed the unusual nature of the services as not normally performed by defense counsel. Id. at 482. For jurisdictional purposes, the court distinguished the alleged contract the government made with Mr. Bailey to assist in asset forfeiture proceedings from the defendant's plea agreement and the criminal proceedings. The court also noted, however, that "[i]f [the criminal defendant] subsequently had filed a complaint in the Court of Federal Claims, alleging breach of the plea agreement and seeking money damages, the principles established in Kania and Sanders would lead to the dismissal of his complaint by the court." Id.

Mr. Pappas, in his briefs in opposition to the government's motion to dismiss, tried to emphasize the civil nature of his alleged Agreement with the government in an attempt to distinguish it from the criminal-in-nature agreements made in the Kania line of cases. Mr. Pappas described the alleged Agreement he had entered into as one for a "service unrelated to any pending criminal proceeding" and argued that the services rendered by a private party

must have a nexus with criminal activity or a pending criminal proceeding in order to be dismissed for a lack of jurisdiction, [deleted]' [T]he alleged consideration offered by the government for Mr. Pappas' service was for immunity from criminal prosecution, an offer only available from the government in its sovereign capacity. Mr. Pappas was not promised any form of monetary compensation for the services he was to perform, nor has Mr. Pappas alleged that he was promised monetary compensation. Moreover, although the plaintiff in his complaint seeks $10,000,000.00 in damages, he does not describe "in his complaint, or in his briefs filed with this court opposing the government's motion to dismiss for lack of jurisdiction, any contractual basis for monetary relief in the event of a breach of the alleged immunity Agreement.

The government's dealings and alleged immunity Agreement with Mr. Pappas were clearly related to the criminal investigation of Mr. Pappas and subsequent indictment. The government, in the case of Mr. Pappas, as well as in Kania, Sanders, Houston, Silva, and Drakes, discussed above, was acting with regard to criminal matters in its sovereign capacity, not in a civil contracting capacity, when offering immunity and plea arrangements in return for [deleted] services. This court does not have jurisdiction over claims against the government when the government has acted solely in its sovereign capacity on criminal matters. See Sanders v. United States, 252 F.3d at 1334-36; Kania v. United States, 227 Ct. Cl. at 467, 650 F.2d at 269; Houston v. United States, 60 Fed. Cl. at 512;

Silva v. United States, 51 Fed. Cl. at 377-78; Drakes v. United States, 28 Fed. Cl. at 193-95.

In contrast, this court had jurisdiction over the claim in Bailey because when securing Mr. Bailey's assistance for the property repatriation efforts as part of the forfeiture proceedings, the government was acting in a civil, contracting capacity and the government offered Mr. Bailey monetary value for his services. See Bailey v. United States, 54 Fed. Cl. at 482-83. Although Mr. Bailey did not prevail in the action filed in this court due to the failure of the parties to reach a meeting of the minds on the contractual sum, the trial testimony in the case demonstrates discussion between the parties regarding specific monetary compensation. See id. at 463-69. Although the alleged agreement with Mr. Bailey was related to a pending criminal prosecution of Mr. Bailey's client, the substance of the contractual dispute was a civil agreement for monetary compensation that was separate from the criminal proceeding. See id. In contrast, the government's alleged Agreement with Mr. Pappas to perform services for the government, was negotiated in the context of possible prosecutorial immunity from criminal prosecution for Mr. Pappas, not monetary compensation.

The plaintiff also argues in his brief that since the government originated the foundation of the present action "in civil court alleging that he breached [a] civil agreement," he has successfully availed himself of the jurisdiction of this court. The government's claim, however, was dismissed by the District Court, leaving only Mr. Pappas'

counterclaim prior to transfer to this court. Moreover, the government's initiation of a suit in a United States District Court does not automatically confer jurisdiction in the United States Court of Federal Claims, the jurisdiction of which is defined by Congress. Finally, the government's initiation of a civil suit in a United States District Court for injunctive relief and specific performance based on breach of the Agreement, which Mr. Pappas also alleges was breached by the government with regards to promises made to him, does not change the criminal nature of that Agreement. The alleged immunity offered to Mr. Pappas in the Agreement in exchange for non-disclosure and services to be performed, could only have been entered into by the government in its sovereign capacity. Monetary compensation by the government was not contemplated in the Agreement for Mr. Pappas' non-disclosure or services and was not contemplated as a remedy in the event of a breach.

Although the court recognizes that Mr. Pappas' case was transferred to this court by a United States District Court, nonetheless, this court does not possess jurisdiction to grant the injunctive relief, specific performance, or monetary damages sought by the plaintiff. Remedies, if any remain, are in the jurisdiction of the court which presided over the criminal prosecution and plea agreement. As stated in Kania v. United States:

> It would be reasonable to expect that the court which is to police and, in appropriate cases enforce, agreements for plea bargains, or witness protection,

> or for immunity, will be the courts in which are or will be pending the criminal prosecutions to which the agreements relate. If this means that money damages for breach are nowhere available, this is the case in any claim area where the Congress has not seen fit to grant its consent to be sued.

Kania v. United States, 227 Ct. Cl. at 465-66, 650 F.2d at 268-69.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss the plaintiff's complaint is **GRANTED**. The clerk's office shall enter **JUDGMENT** for the defendant consistent with this opinion. Each party shall bear its own costs.

IT IS SO ORDERED.

/s/ Marian Blank Horn
MARIAN BLANK HORN
Judge

In the United States Court of Federal Claims

[ENTERED: JUNE 8, 2005]

DENNIS J. PAPPAS,

Plaintiff,

v.

No. 05-219C
Filed: June 8, 2005

UNITED STATES,

Defendant.

ORDER

The court issued its decision in the above captioned case on June 8, 2005, dismissing plaintiff's complaint. The court's opinion was issued under seal to afford the parties an opportunity to review the opinion and propose redactions to the court with a view toward publication of a public version of the opinion.. On or before **Wednesday, June 22, 2005,** the parties shall file a joint status report either proposing specific redactions to the court, or indicating that redactions are not required. If the parties propose redactions, a marked up copy of the opinion reflecting the redactions shall be attached to the June 22, 2005 joint status report.

IT IS SO ORDERED.

/s/ Marian B. Horn
MARIAN BLANK HORN
Judge

In the United States Court of Federal Claims

[ENTERED: MARCH 25, 2005]

DENNIS J. PAPPAS,

Plaintiff,

v.

No. 05-219C
Filed: March 25, 2005

UNITED STATES,

Defendant.

ORDER

In a February 14, 2005 Notice of Designation, the above captioned, transfer case was designated an electronic case in the court's case management/electronic case filing (CM/ECF) system. However, the case is sealed. Given the nature of the case and in an abundance of caution, the clerk's office shall **REMOVE** the case from the CM/ECF system, beginning with this order.

On March 24, 2005, the court, sua sponte, raised the issue of Court of Federal Claims jurisdiction with the parties. The parties agreed with the following schedule. On or before **Monday, May 2, 2005**, the parties shall file simultaneous initial briefs addressing this court's jurisdiction, particularly in light of the United States Court of Claims case of Kania v. United States, 227 Ct. Cl. 458, 650 F.2d 264, cert. denied, 454 U.S. 895 (1981), and the progeny of Kania. On or before **Tuesday,**

May 17, 2005, the parties shall file simultaneous reply briefs on the jurisdictional issue. The parties also shall indicate whether the court's attention is directed to submissions by the parties in the United States District Court for the Eastern District of New York on the jurisdictional issues and, if so, shall identify the submissions with specificity in their initial briefs.

IT IS SO ORDERED.

/s/ Marian Blank Horn
MARIAN BLANK HORN
Judge

In the United States Court of Federal Claims

[ENTERED: MARCH 17, 2005]

DENNIS J. PAPPAS,

Plaintiff,

v.

No. 05-219C
Filed: March 17, 2005

UNITED STATES,

Defendant.

ORDER

On February 14, 2005, the above-captioned case, transferred from The United States District Court for the Eastern District of New York, was filed with this court. Pursuant to the Rules of the Court of Federal Claims (RCFC) 3.1(a)(2), "Eight copies of the complaint filed in the other court, containing the necessary changes in the caption and duplicated in conformity with RCFC 5.3, shall be filed with the clerk within 28 days after the filing required in subdivision (a)(1). In lieu thereof and within the same time period, an original and 7 copies of an amended complaint may be filed in conformity with the rules of this court setting forth the claim or claims transferred." Since the plaintiff in the above-captioned case has not filed a complaint in the requisite time, the court **ORDERS** that, on or before **Wednesday, April 6, 2005,** the plaintiff shall file the original complaint, an amended complaint, or show cause why his case should not be dismissed, with prejudice, for failure to prosecute and comply with the rules of this court in accordance with RCFC

41(b). RCFC 41(b) states: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim."

Because public policy strongly favors the prompt disposition of cases by trial courts, and in order to expedite judicial proceedings while preventing undue delays in the disposition of pending cases, federal trial courts have been given broad discretion to dismiss a plaintiff's action with prejudice. Link v. Wabash R.R. Co., 370 U.S. 626, 629-30, reh'g denied, 371 U.S. 873 (1962); see also Chambers v. NASCO, Inc., 501 U.S. 32, 43, 44 (describing implied powers of courts to manage their own affairs for the orderly and expeditious disposition of cases, including the power to dismiss a suit for failure to prosecute), reh'g denied, 501 U.S. 1269(1991): Syntex Ophthalmics, Inc. v. Novicky, 795 F.2d 983, 986 (Fed. Cir. 1986) (affirming dismissal of defendant's counterclaims for failure to appear at trial); Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 590-91 (6th Cir. 2001); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66-67 (1st Cir. 1999). Several courts have indicated that, although subject to rebuttal, prejudice to the defendant resulting from unreasonable delay or a failure to prosecute may be presumed. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 210 (2d Cir. 2001); Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Citizens Utils. Co. v. American

Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

Furthermore, a court may dismiss a case for failure to prosecute on its own initiative. In addition to the explicit authority set forth in RCFC 41(b), "[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. at 630-31 (footnote omitted); see also Chambers v. NASCO, Inc., 501 U.S. at 43, 44; Lyell Theatre Corp., 682 F.2d at 42-43; Colbert v. United States, 30 Fed. Cl. 95, 97 (1993). The United States Court of Appeals for the Federal Circuit has explicitly adopted the standards articulated in Link. See, e.g., Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1184-85 (Fed. Cir. 1990); Kadin Corp. v. United States, 782 F.2d 175, 176-77 (Fed. Cir.), cert. denied, 476 U.S. 1171 (1986). The court in Kadin stated that, "[i]f [Claims Court] judges are to discharge their heavy responsibilities effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical." Kadin Corp. v. United States, 782 F.2d at 177 (quoting Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D.C. Cir. 1981)); see also Chamorro v. Puerto Rican Cars, Inc., 304 F.3d 1, 4 (1st Cir. 2002) ("[C]ourts must be given considerable leeway in exercising their admitted authority to punish laggardly or noncompliant litigants."). The United States Court of Appeals for the Federal Circuit also stated that this court's exercise of discretion to

dismiss a case for failure to prosecute will not be disturbed on appeal "unless upon a weighing of relevant factors we are left with 'a "definite and firm conviction" that the court below committed a clear error of judgment.'" Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987) (quoting Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 917 (Fed. Cir. 1984)).

As noted by the United States Court of Appeals for the Federal Circuit, "dismissal is a harsh sanction ... ." Kadin Corp. v. United States, 782 F.2d at 176: accord Martens v. Thomann, 273 F.3d 159, 179 (2d Cir. 2001); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d at 209. In Kadin, however, plaintiff's and counsel's "entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation." Kadin Corp. v. United States, 782 F.2d at 177. When a plaintiff files a lawsuit in this court, the court must presume that the party intends to prosecute that case to a final resolution in accordance with the Rules of the Court. Failure to conform with the court rules and court orders forces the court to abandon that presumption, and warrants dismissal, with prejudice, pursuant to RCFC 41(b).

On March 14, 2005, the plaintiff's attorney attempted to file with the court a document titled "Answer and Counterclaim." The clerk of the court is directed to return that document and the attached copies to the plaintiff for failure to comply with the rules of the court. In order to continue the action in

this court, the plaintiff must file a complaint. The United States as the defendant will then file an answer. It is not clear what the plaintiff intended by the word "counterclaim." The plaintiff is reminded to review and comply with the rules of this court. Failure to do so may result in dismissal of the action as discussed above.

IT IS SO ORDERED.

s/ Marian Blank Horn
MARIAN BLANK HORN
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[ENTERED: SEPTEMBER 17, 2004]

UNITED STATES OF AMERICA,

Plaintiff,

MEMORANDUM AND ORDER
96-CV-5043
-against- (JS)(MLO)

DENNIS J. PAPPAS,

Defendant.

Appearances:
For Plaintiff: Richard A. Mastrocola, Esq.
Blodnick, Gordon, Fletcher
& Sibell, P.C.
900 Merchants Concourse,
Suite 400
Westbury, New York 11590

For Defendant: Thomas A. MacFarland, Esq.
United States Attorney
147 Pierrepont Street - 14th Fl.
Brooklyn, New York 11201

SEYBERT, District Judge:

Pending before the Court is Plaintiff, the United States of America's ("Plaintiff"), motion to dismiss Defendant Dennis Pappas' ("Defendant")

counterclaim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), or alternatively for judgment on the pleadings pursuant to Rule 12(c). The original claim asserted by Plaintiff in this case has been voluntarily dismissed and the only action currently before the Court is Defendant's counterclaim.

Background

In 1993, the Plaintiff and the Defendant allegedly entered into an agreement whereby the Defendant would provide certain services promoting national security for the Government, while maintaining total secrecy (the "Agreement"). In exchange, the FBI indicated it would not further investigate or prosecute Defendant or his wife. Contrary to this Agreement, however, the Plaintiff prosecuted Defendant and his wife, and they were indicted before a grand jury. The Defendant later pled guilty to the charges.

According to the Plaintiff, it was not bound by the Agreement because it was brokered and signed by an FBI agent unauthorized to make such arrangements. Defendant contends that the agent carried a F.I.S.A. warrant, illustrating his authority to enter into the Agreement. The Plaintiff alleges that it was additionally not bound by the alleged Agreement because the Defendant violated the secrecy clause contained therein.

The Plaintiff brought a civil suit against the Defendant for violating the secrecy clause of the Agreement. Those charges were voluntarily dropped

by the Plaintiff after the Defendant entered his guilty plea in the criminal case. The Defendant, however, brought a counterclaim for breach of contract, alleging the Plaintiff violated the main tenet of the Agreement by investigating and prosecuting the Defendant and his wife. The Plaintiff moves to dismiss the counterclaim for lack of subject matter jurisdiction, and on the grounds that the claim should be barred by the principle of collateral estoppel.

Alternatively, the Plaintiff moves for judgment on the pleadings pursuant to Rule 12(c). The Defendant opposes the motions, and additionally moves to supplement his counterclaims with new information pursuant to Rule 15 (d).

Discussion

I Motion to Supplement

"Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." FED R. CIV. P. 15(d). The Court finds no compelling reason to deny Defendant's application to supplement his counterclaim; there does not appear to be any prejudice on the Plaintiff, nor does the Plaintiff oppose the motion. The motion to supplement is therefore GRANTED.

II Sovereign Immunity

The Plaintiff alleges that it is protected from suit by the doctrine of sovereign immunity because it has not expressly waived such immunity. Typically, the United States may not be sued without express and unequivocal consent to suit from Congress, usually by statute, because of sovereign immunity. See Gardner v. United States, 445 F.2d 1195, 1197 (2d Cir. 1971) (citing United States v. Sherwood, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941); United States v. Shaw, 309 U.S. 495, 500-01, 60 S. Ct. 659, 84 L. Ed. 888 (1948)).

However, when an otherwise immune party voluntarily brings the original claim, they effectively waive their immunity and are subject to appropriate counterclaims arising from the same common nucleus of facts:

> "If a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect to a set-off or counterclaim. . . . [Plaintiff] is unarmed with immunity as against the rights of a defendant who has a proper set-off to his claim."

United States v. National City Bank of New York, 83 F.2d 236, 238 (2d Cir. 1936).

Here, the United States constructively waived its right to sovereign immunity by virtue of its

concession to this Court's jurisdiction. By launching the original action, filing suit in this Court, and acting as master of the claim, the Plaintiff surrendered its rights to claim sovereign immunity. The Court finds it would be patently unjust to allow the Plaintiff to bring its breach of contract claim, while disallowing the Defendant's breach of contract counterclaim which arises from the same set of facts and occurrences. Accordingly, the Court considers the Plaintiff properly subject to effective and appropriate counterclaims brought by the Defendant, including the instant counterclaim.

III Subject Matter Jurisdiction

Although this Court finds that the Plaintiff has waived its sovereign immunity by bringing its original claim before the Court, the Court does not inherently possess subject matter jurisdiction to hear the Plaintiff's original claim or the Defendant's current counterclaim. No party may confer subject matter jurisdiction on a court, even by consent. See Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982).

According to 28 U.S.C. § 1346, also known as the Tucker Act, the relevant district court has original jurisdiction over contract claims for monetary relief against the U.S. Government when the claim does not exceed $10,000. See Ward v. Brown, 22 F.3d 516, 519 (2d Cir. 1994); 28 U.S.C. § 1346. For claims exceeding $10,000, however the Court of Federal Claims, while not possessing exclusive jurisdiction, see Ontoye v. United States,

903 F. Supp. 357, 362 & n.6 (E.D.N.Y. 1995) (citing Ward, 22 F.3d 516); but see In re Chateaucray, 53 F.3d 478 (2d Cir. 1995) (dicta that the Federal Court of Claims has exclusive jurisdiction over Tucker Act claims exceeding $10,000), is the more appropriate forum for contract claims against the United States.

In this case, the breach of contract claim asserted against the United States exceeds $10,000. Moreover, because the original claim brought by the Plaintiff was voluntarily dismissed, there is no adhesive force of ancillary jurisdiction compelling the Court to hold this counterclaim in its jurisdiction when the Court of Federal Claims is the more appropriate venue. See Adeleke v. United States, 355 F.3d 144, 152 (2d Cir. 2004) (indicating proper transfer from district court to Court of Federal Claims) (citing Waters v. Rumsfeld, 320 F.3d 255, 272 n.8 (D.C. Cir. 2003)). Accordingly, this claim shall be transferred to the Court of Federal Claims.

Having determined that subject matter jurisdiction over this claim more properly lies in another Court, the Court will not consider the Plaintiff's further arguments relating to the merits of the claim.

CONCLUSION

For the reasons set forth above, the Defendant's motion to supplement is GRANTED. The Plaintiff's motion to dismiss the counterclaim is DENIED and the case is hereby ORDERED TRANSFERRED to the Court of Federal Claims.

SO ORDERED

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
September 17, 2004

LEXSEE 94 F3D 795

UNITED STATES OF AMERICA, Appellee, v. DENNIS PAPPAS, Defendant-Appellant

[ENTERED: SEPTEMBER 3, 1996]

Docket No. 96-1190

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

94 F.3d 795; 1996 U.S. App. LEXIS 28749

June 7, 1996 Argued
September 3, 1996

SUBSEQUENT HISTORY: As Corrected.

PRIOR HISTORY: Appeal from the March 5, 1996, order of the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., Judge) imposing restrictions upon appellant and his defense counsel with respect to disclosure of classified information.

DISPOSITION: Dismissed in part and remanded in part.

COUNSEL: Ronald L. Kuby, New York, N.Y. (Daniel M. Perez, Eve S. Rosahn, Kunstler and Kuby, New York, N.Y., on the brief), for defendant-appellant.

Barbara Underwood, Asst. U.S. Atty., Brooklyn, N.Y. (Zachary W. Carter, U.S. Atty., Burton Ryan, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

JUDGES: Before: NEWMAN, Chief Judge, JACOBS, Circuit Judge, and CHATIGNY, * District Judge.

* Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

OPINION BY: JON O. NEWMAN

OPINION:

JON O. NEWMAN, Chief Judge:

This appeal requires consideration of the Classified Information Procedures Act ("CIPA"), *18 U.S.C. app. 3* (1994), which has infrequently been before the courts. Dennis J. Pappas appeals from the March 5, 1996, order of the District Court for the Eastern District of New York (Thomas C. Platt, Judge) imposing restrictions upon him and his defense counsel with respect to disclosure of classified information. The order was issued in the course of a pending criminal prosecution of Pappas. We conclude that part of the March 5 order is not appealable, but that the part prohibiting disclosure of information acquired prior to the litigation is appealable. We also conclude that CIPA does not apply to such previously acquired information, but that disclosure might nonetheless be prohibited under ordinary principles of contract law. We

therefore dismiss in part, and remand for consideration of the contract issues.

Background

Our presentation of the background of the pending dispute must necessarily be somewhat elliptical since the information the Government seeks to restrict relates to matters of national security. The record and the parties' briefs and appendices have been submitted to the Court under seal and in conformity with applicable regulations governing cases involving classified information. See Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025 by the Chief Justice of the United States for the Protection of Classified Information, *18 U.S.C.A. app. 3*, note (West 1985). We discuss only such facts and allegations as were aired by the parties during oral argument, which was held in open court.

Pappas and his wife are defendants in a criminal case pending in the District Court. Before being indicted, Pappas claimed that his prior activities on behalf of the Government entitled him at least to some favorable consideration, and since the indictment he has sought dismissal because of his prior activities. In response to the defendant's filing of notice of intent to reveal classified information, the Government, invoking CIPA, sought and obtained, ex parte and in camera, a protective order on January 4, 1996. The January 4 order establishes procedures to maintain the confidentiality of classified information and to permit defense counsel to have access to such information, subject to

appropriate security clearances. It applies generally to classified information, without distinction as to whether the information was known to Pappas prior to the initiation of the criminal case or was disclosed to him in connection with the case.

Thereafter, Pappas met with reporters at the Metropolitan Correctional Center, and a New York City newspaper published two stories describing what was alleged to be Pappas's activities with the Government. On March 5, the District Court issued a supplemental protective order, which is the subject of the pending appeal. The March 5 order requires Pappas and his counsel to maintain the confidentiality of classified material "received or obtained by the defense whether before or after this order from any agent of the United States in connection with Dennis J. Pappas' alleged participation with any agency in question herein." The March 5 order also unseals some documents previously sealed and requires other documents to be sealed.

Discussion

Pappas's appeal challenges the March 5 protective order primarily on the ground that it prohibits his public disclosure, by "comment, confirmation or denial," of any classified information covered by the order. He particularly objects to the disclosure prohibition to the extent that it prevents him from making public comment on matters already disclosed in a local newspaper. He also challenges the March 5 order's requirement that certain documents be sealed.

I. Appealability

At the outset, we encounter the Government's contention that the March 5 protective order is not subject to an interlocutory appeal. The Government contends that the order is not "final" within the meaning of *28 U.S.C. § 1291*, since it is explicitly subject to further CIPA procedures. The Government also deems the order not appealable as an injunction under *28 U.S.C. § 1292(a)(1)* on the theory that CIPA, by explicitly permitting a Government appeal of a denial of protective order, *18 U.S.C. app. 3*, § 7, impliedly "withholds" an appeal by the defendant from the granting of such an order. Appellant responds that we have entertained an appeal from a protective order barring discussion of a case, see *United States v. Salameh, 992 F.2d 445 (2d Cir. 1993)*, and have indicated that such orders are subject to some form of appellate consideration, see *United States v. Cutler, 58 F.3d 825, 832-33 (2d Cir. 1995)*; In re Dow Jones & Co., *842 F.2d 603, 609 (2d Cir.), cert. denied , 488 U.S. 946 (1988)*. The Government replies that Salameh involved an order so clearly beyond constitutional limits as to be subject to mandamus under *28 U.S.C. § 1651*.

Salameh did not discuss appealability, though it adjudicated what the enjoined party styled an "appeal," *Salameh, 992 F.2d at 446*, and the Court gave no indication that the appeal was being treated as a mandamus. Nevertheless, we doubt that Salameh intended to authorize an appeal of a protective order that does not contain the sweeping restraint at issue in that case. Protective orders that only regulate materials exchanged between the

parties incident to litigation, like most discovery orders, are neither final orders, appealable under *28 U.S.C. § 1291*, see *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 162-63 (2d Cir. 1992)*; *SEC v. Sloan, 535 F.2d 679, 681 (2d Cir. 1976)*, nor injunctions, appealable under *28 U.S.C. § 1292(a)(1)*. See *Taylor v. Board of Education, 288 F.2d 600, 604 (2d Cir.)* ("[N]ot every order containing words of restraint is a negative injunction within *28 U.S.C. § 1292(a)(1).*") (citations omitted), cert. denied, 368 U.S. 940 (1961). In rare instances, they might raise issues available for review via a petition for mandamus. See *In re Steinhardt Partners, L.P., 9 F.3d 230, 233 (2d Cir. 1993); Chase Manhattan, 964 F.2d at 163-64.*

To the extent that the March 5 order imposed restrictions on the parties' disclosure of materials exchanged in the course of the pending litigation, it is not subject to appeal. However, to the extent that the order prohibits Pappas from disclosure of information he acquired from the Government prior to the litigation, the order is not a typical protective order regulating discovery documents and should be appealable because of the breadth of its restraint. See *Salameh, 992 F.2d at 446-47*. The Government's contention that CIPA "withholds" appellate jurisdiction is unavailing. CIPA does not deny any appellate jurisdiction that otherwise exists. It simply extends to the Government, but not to the defendant, the opportunity for an interlocutory appeal of protective orders in circumstances where an appeal would not otherwise exist. *18 U.S.C. app. 3, § 7.*

II. The Merits

The issue available for appeal is whether the March 5 order may validly prohibit Pappas from disclosing classified information received from the Government prior to this litigation. Since the order is grounded on CIPA, we consider that source of authority first.

A. CIPA Prohibition on Disclosure

CIPA "was designed to establish procedures to harmonize a defendant's right to obtain and present exculpatory material upon his trial and the government's right to protect classified material in the national interest." *United States v. Wilson, 571 F. Supp. 1422, 1426 (S.D.N.Y. 1983)* (Weinfeld, J.). It sought to "minimize the problem of so-called graymail--a threat by the defendant to disclose classified information in the course of trial--by requiring a ruling on the admissibility of the classified information before trial." S. Rep. No. 823, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S.S.C.A.N. 4294, 4295 (" Senate Report "); see *United States v. Wilson, 721 F.2d 967, 975 (4th Cir. 1983).*

The risk of graymail can arise in various circumstances. Sometimes in pretrial discovery proceedings the "defendants and their counsel . . . press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution." Senate Report at 3, reprinted in 1980 U.S.S.C.A.N. at 4296 (statement of Asst. Att'y Gen. Heymann). n1. In other circumstances, "the government expects to

disclose some classified items in presenting its case." Id. at 4, reprinted in 1980 U.S.S.C.A.N. at 4297 (statement of Asst. Att'y Gen. Heymann). In still other circumstances, the defendant has acquired classified information prior to the Government's initiation of a criminal prosecution, and the defendant can be expected to disclose such information in the course of presenting a defense, either at the pretrial or trial stage of the case. The information sought to be protected from disclosure in the pending case is in this third category.

> n1. Asst. Att'y Gen. Heymann's testimony, quoted in the Senate Report, was presented at a prior hearing of a House of Representatives subcommittee. See Graymail Legislation: Hearings Before the Subcomm. On Legislation of the House Permanent Select Comm. on Intelligence, 96th Cong., 1st Sess. 4-5 (1979)

CIPA establishes several procedures to minimize the risk of graymail and to adjust the competing interests of the Government in maintaining its secrets and of the defendant in mounting an effective defense. Several of these procedures are pertinent to the issues arising on this appeal. Section 5 requires the defendant to give notice to the Government and the court of an intent to disclose classified information "in connection with any trial or pretrial proceeding." It further provides that a defendant shall not disclose classified information "in connection with a trial or pretrial proceeding" until the required notice has been given and the Government has had a reasonable

opportunity to invoke the protections available under section 6.

Subsection 6(a) authorizes the Government to request, and obliges the court to make, a pretrial determination of the use, relevance, or admissibility of classified information that would otherwise be determined at trial. Subsection 6(c) provides that upon the court's determination that disclosure is authorized, the Government may apply for a court order to avoid such disclosure either by admitting relevant facts that the information to be disclosed would tend to prove or by providing the defendant with a summary of such information. Subsection 6(e)(1) provides that if the court denies the Government's subsection 6(c) application, "the court shall order that the defendant not disclose" such information, and subsection 6(e)(2) provides that whenever a defendant is prohibited from disclosure by a subsection 6(e)(1) order, the court shall dismiss the charges, or, if such action would not serve the interests of justice, take alternative, remedial steps.

Section 3 provides that, on the Government's motion. the court must issue a protective order to guard against the disclosure of any classified information "disclosed by the United States to any defendant in any criminal case."

CIPA thus contemplates three circumstances in which a defendant may be prohibited from disclosing classified information. One is during the pendency of a Government application for a section 6 pretrial ruling and remedy. A second is following a court's ruling that the Government may not use

alternatives in lieu of disclosure and must therefore accept dismissal (or sometimes lesser remedies) as the price of resisting disclosure. A third is following the court's issuance of a protective order.

The third circumstance explicitly limits the scope of the prohibition on the defendant's disclosure to "classified information disclosed by the United States to any defendant in any criminal case." That prohibition appears to have no application to Pappas since the information at issue was not disclosed to him "in" a criminal case. However, it is arguable that the protective order authorized by section 3 can prevent the defendant from disclosing in the criminal case classified information that was previously acquired. n2. The prohibitions permitted in the first two circumstances are also ambiguous as to whether they apply only to information disclosed to a defendant in a criminal case or, in addition, apply to information that the defendant previously acquired.

> n2. Section 3 could apply to previously acquired information if the provision was construed, in a somewhat strained manner, to mean that its coverage includes information disclosed at any time to a person who subsequently becomes a defendant in a criminal case.

Fortunately, the legislative history of CIPA makes it clear exactly how Congress intended the disclosure prohibitions to apply. The Senate Report, discussing a section 3 protective order, states:

> If the defendant already had classified materials in his possession, such a protective order can prevent disclosure in connection with the trial but it cannot be expected to reach disclosure outside the trials. Federal criminal statutes apply to such disclosures.

Senate Report at 6, reprinted in 1980 U.S.C.C.A.N. at 4299. Thus, though the Senate Report understood that a section 3 protective order can apply to the defendant's previously acquired information, the order may prohibit disclosure only "in connection with the trial" and not outside the trial.

The understanding of the relevant committees of the House of Representatives is even more emphatic. The most detailed House report is that of the Permanent Select Committee on Intelligence. See H. R. Rep. No. 831, 96th Cong., 2d Sess., pt. 1 (1980) ("House Report"). n3. The House Report considered first the prohibition on disclosure following the defendant's notice of intent to disclose. This provision, which became section 5 of CIPA, was section 102(a)(1) of H.R. 4736. The House Report states:

> The Committee wishes to emphasize that neither the language of section 102(a)(1) concerning the prohibition on disclosure (nor the court order provisions of sections 102(d) and 105(a)) are in any way intended to be the basis for any proposed expansion or reinterpretation of the law of prior

> restraint, and section 102(a)(1) is not, in fact, intended to be a prior restraint provision at all. . . . The intent is to leave the law of prior restraint undisturbed. It has been held that the trial court has broad discretion in prohibiting disclosure by the defendant of information obtained by the defendant through use of the court's processes, such as through discovery. A prohibition in this area can extend to out-of-court disclosures and to post-trial disclosures. The court's authority is narrowed where the information at issue was in the possession of the defendant before the trial began and was not obtained by the defendant with the aid of the court. In this area, the court's authority to prohibit disclosure extends only to a regulation of what may be said or introduced in the trial context.

House Report at 13-14 (footnote omitted) (emphasis added). Then the House Report discussed the prohibition on disclosure that follows a court's rejection of a Government request for alternative procedures to avoid disclosure. This provision, which became section 6(e) of CIPA, was section 105(a) of H.R. 4736. The House Report emphasized:

> As the discussion accompanying section 102(a) notes, generally, such order may only extend to disclosure in connection with the trial if it pertains to classified

> information not obtained by the defendant through the court's processes.

House Report at 21 n.17.

> n3. The House bill, H.R. 4736, was jointly referred to both the Permanent Select Committee on Intelligence and the Committee on the Judiciary. The Judiciary Committee's report states, "The Judiciary Committee's endorsement of H.R. 4736 reflects its judgment that the Intelligence Committee weighed carefully the competing interests at stake in this legislation and achieved the proper balance between them. The Committee felt no need to independently scrutinize every provision of the bill." See H.R. Rep. No. 831, 96th Cong., 2d Sess. pt. 2, at 5 (1980).

Finally, the House Report discussed the scope of the protective order authorized by section 109(a) of H.R. 4736, which became section 3 of CIPA:

> Section 109(a) directs the court, upon motion of the government, to issue an order for the protection against unauthorized disclosure of classified information disclosed by the government to the defendant. The provision is intended to codify the well established practice, based on the inherent authority of federal courts, to issue protective orders. Such orders are

> usually associated with the discovery process. Subsection (a) makes it clear that protective orders are to be issued, if requested, whenever the government discloses classified information to a defendant in connection with a prosecution, e.g., Brady and Jencks material.

House Report at 26.

Thus, the scope of CIPA prohibitions on a defendant's disclosure of classified information may be summarized as follows: information conveyed by the Government to the defendant in the course of pretrial discovery or the presentation of the Government's case may be prohibited from disclosure, including public disclosure outside the courtroom, but information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only "in connection with the trial" and not outside the trial. Since Pappas acquired the information at issue before the trial, CIPA does not authorize the District Court's order to the extent that the order prohibits public disclosure outside the court proceedings. Whatever protection the Government is entitled to obtain against such disclosure must be found in sources of law other than CIPA.

B. Contractual Prohibition on Disclosure

Though the prohibition of public disclosure of previously acquired information may not be supported by CIPA, it may nonetheless be supported

under ordinary principles of contract law. Preliminarily, we note that the contract issues are governed by federal common law. Whatever the role of state law might be when the United States contracts in a purely proprietary capacity, there can be no doubt that a contract for services on matters involving national security are governed by federal law. See *Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943)* (commercial paper of the United States); *United States v. Snepp, 595 F.2d 926, 936 n.10 (4th Cir. 1979)* (contract for CIA employment), aff'd with apparent approval of this point, *444 U.S. 507, 514 n.10 (1980)*; see generally Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 863-69 (3d ed. 1988) (discussing choice of law in federal government litigation). Moreover, on such a topic, uniform federal law is appropriate, though such law may be informed by applicable general principles of state law. See *United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979)* ("Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate the formulation of controlling federal rules." (quoting *United States v. Yazell, 382 U.S. 341, 354 (1966)*)).

Both the Government and Pappas allege that some contractual arrangement was formed between them, though the terms of the agreement are in dispute. They agree, however, that Pappas was told not to disclose his activities with the Government to anyone, and the Government contends that he accepted that instruction as a condition of his subsequent dealings with the Government. It is not clear at this point whether those dealings involved

actual employment or only discussions to consider employment, although even the latter might well give rise to enforceable obligations. The Government is entitled to enforce its agreements to maintain the confidentiality of classified information. See *Snepp, 444 U.S. at 510-16; United States v. Marchetti, 466 F.2d 1309, 1316-17* (4th Cir.), *cert. denied, 409 U.S. 1063 (1972).*

Pappas contends that whatever contractual restraint may be applicable cannot prohibit his disclosure of information that he alleges he has already made public. Though information in the public domain would normally not be subject to a restraint on disclosure, see *Snepp, 444 U.S. at 513 n.8; Marchetti, 466 F.2d at 1317*, that principle does not benefit Pappas for two related reasons. First, he contends that it was his own disclosure that made the information public. Second, such self-help does not free him of contractual restraint in circumstances where risks to legitimate interests of the Government might arise from repeated disclosure or from the intended or even unintended amplification that is likely to accompany such disclosure.

Since the District Court made no findings with respect to the Government's contractual claim to prohibit disclosure, the matter must be remanded for further proceedings to determine what contractual restrictions bind Pappas and whether, in the circumstances of this case, those restrictions, if established, entitle the Government to an order prohibiting Pappas from disclosure outside the trial context. n4. Though the existence of the District

Court's prohibition on such disclosure constitutes a prior restraint, we will maintain it in place pending the proceedings on remand since Pappas's own affidavit strongly supports the Government's contractual claim and since Pappas affirmatively alleges that the information he wishes to discuss has already been made public. As noted, there remain governmental interests in preventing further or even repeated disclosure and slight public interest in mere repetition.

> n4. Since the parties have not briefed the issue on this appeal, we leave it to the District Court to consider whether a prohibition grounded on a contract claim may be entered within the pending criminal case or requires initiation of a civil suit, referable to the same district judge as a related case.

Accordingly, the appeal is dismissed to the extent that it challenges restrictions on information exchanged during the pending litigation. To the extent that the appeal challenges the prohibition on disclosure of previously acquired information, the case is remanded for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA,

v. CR 95 0368(S-1)

DENNIS PAPPAS
ANDREA PAPPAS
Defendants.
----------X
----------X
UNITED STATES OF AMERICA,

v. CV 96 5043

DENNIS PAPPAS

Defendant.
----------X

U.S. Courthouse
Uniondale, New York

TRANSCRIPT OF MOTION
November 22, 1996
11:00 o'clock a.m.

BEFORE:

HONORABLE THOMAS C. PLATT, U.S.D.J.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by Computer-Assisted Transcription.

THE CLERK: Criminal motion, United States versus Dennis Pappas and Andrea Pappas.

THE COURT: As a preliminary matter – I don't know what to do with it, but Judge Cyganowski sent over by hand yesterday a copy of an order an a removal of page 6 and a copy of other papers. I guess a Steiger affidavit and so forth. And said either give it to Londergan or the government or whoever, and we all agree it should be given to — these are the documents, or at least the signed affidavit, which is the document which was under seal, of which I understand you were not aware. And I guess they go back under seal to the Court unless we get some sort of motion to unseal them.

MR. KUBY: That would be fine, Judge. I have actually an informal motion to unseal this Steiger affidavit pending. And I spoke to Mr. Londergan this morning just to confirm what had been my information all along, that the Steiger affidavit does not contain and has never contained classified information, and hence, to place in the custody of the court security officer in charge of classified information is unnecessary unless —

THE COURT: What does Mr. Ryan say about the Steiger affidavit?

MR. RYAN: Judge, we believe it should remain sealed because there is certainly information in there that goes beyond this particular indictment. There is information concerning describing – a confidential source is generally relative to the Orena family and the Orena – and the Colombo family economic interests should remain sealed.

That's one of the purposes for keeping this unsealed only for the very limited purposes it was unsealed for in the initial hearing. There's been no Fourth Amendment challenge or any challenges to any of the seizures here. It is really unnecessary to have it unsealed available to the general public.

MR. KUBY: May I reply, Judge?

My understanding is that the Steiger affidavit was executed in 1992 in support of the various search warrants for Mr. Pappas' premises.

I also notice Mr. Pappas is not present here in the courtroom.

THE COURT: That's right. I'm assuming somebody is bringing him up.

MR. KUBY: Exactly.

That document was presented to the Court in support of the government's motion to detain Dennis

Pappas back, I suppose, in July or August of 1995, well before I became counsel in the case.

My understanding is that it was originally sealed for the same reason that all affidavits in support of search warrant applications are sealed so as to protect the innocent as well to prevent —

THE COURT: Yes, I think it may be — I don't have this clear a recollection. It may have been kept under seal even after the arrest, although I recall — as I recall it, it was you who used on the bail application, both bail applications — portions of it were used on both bail applications.

MR. KUBY: Actually what I believe happened was on October 2, 1995, again before I became counsel in the case, Mr. Ryan turned this affidavit over to Mr. Scaring as 3500 material, Jenks Act material, as Agent Steiger was testifying. He did so at that time with the request that it remain under seal as to the public at large and the Court signed an order. I never saw that order. I didn't see it until I was served with my contempt motion.

There was a short colloquy on the record on October 2nd where Mr. Ryan said what he was particularly concerned about was the copies of it not circulating at the MCC. Mr. Scaring had no objection. The Court at that time said that better not happen otherwise somebody is trouble. And the affidavit was in fact turned over to Mr. Scaring.

Agent Steiger was cross-examined about the affidavit and the statements in open court on the

record. There was no classified information, no secret issues present.

And that's where the issue remains. In fact the Court itself in its first denial of Mr. Pappas' bail —

THE COURT: I quoted from it.

MR. KUBY: Quoted from it at length. And, of course, there's no notation on the document. At least not that I received saying it's sealed, it's secret, it shouldn't be revealed, et cetera. And it's not the type of document that usually —

THE COURT: Well, the question is should I put it back under seal saving access by you and your client, to which is what the government wants me to do now.

MR. KUBY: I would – at this point. Judge, I would respectfully request that you do not. And I will tell you two uses for that affidavit.

Number one is in the bankruptcy proceeding with respect to Judge Cyganowski, Mr. Marshall though counsel has made statements under oath that he was never a confidential source, a confidential informant for the government. Mr. Marshall, of course, is Mr. Pappas' biggest creditor in the bankruptcy proceeding.

We know from the Steiger affidavit, at least that as far as the government was concerned, that is the truth that in fact Mr. Marshall was such a

source. That raised the question both to the integrity of the bankruptcy proceeding as well as for any attorney disciplinary proceedings that might be brought. Both Mr. Marshall and his attorney, of course, are lawyers and that that affidavit should be disclosed to them.

I mean I don't think it should have been under seal in the first place. After October obviously that was not my call.

THE COURT: I know, but if I release it to you and Mr. Pappas and Mr. Marshall and his attorney in the bankruptcy proceeding and otherwise seal it, is there anything wrong with that?

MR. KUBY: As long as I can send it to department of the disciplinary committee also under seal, I have no objection to that. If out of an abundance of caution you want to keep the document sealed, I have no objection.

THE COURT: What is your interest in sending it to the Appellate Division vis-a-vis the – I assume that Mr. Marshall had the money at that time.

MR. KUBY: That he lied under oath in an affirmation in a judicial proceeding.

THE COURT: You are sole counsel for the petitioner in the bankruptcy.

MR. KUBY: Yes, I am. I am listed as of counsel, although I would certainly concede, as you –

the Court probably figured out, bankruptcy is not my strong point, although I may be headed there eventually.

THE COURT: I don't know. You might have taken bankruptcy courses in law school for all I know. But that is neither here nor there.

Why shouldn't I do that then, Mr. Ryan?

MR. RYAN: Judge, there was only one section of the affidavit that was used in the bankruptcy count. It was used in page 6. That portion, if the Court remembers, when we appeared under the order to show cause with bankruptcy counsel to Mr. Pappas, the government did not object to that, continued that — one portion of it continuing in the bankruptcy proceeding. The judge in the bankruptcy proceeding determined – denied the bankruptcy application,, Mr. Pappas' application in the court at that time and said it was both premature and unnecessary, and did not need to be brought by order to show cause.

If they want to revisit and just use that one section, we have no objection. But as to the remainder of the Steiger affidavit and the Steiger affidavit in whole we would have strong objection to that being made available.

THE COURT: There is another page or two pages, as I recall. Page 6 and I can't remember what the other one was.

MR. RYAN: In Mr. Dahlman's affidavit he excerpted two or three paragraphs that are on page 6. To that portion, Judge, we have no objection.

And as we have represented both to Mr. Pappas' bankruptcy counsel, as well as the trustee in the bankruptcy, any individuals that may be listed as a confidential source for information may not know that they were listed as a confidential source when the affidavit was drafted. It is not the type of information that would have been reviewed with any particular individual.

THE COURT: Well, is that page 6 and the other one to which Mr. Dahlman made reference that would be available?

MR. KUBY: Yes, as long as it's unsealed to the extent that those portions can be —

THE COURT: By you and Mr. Dahlman in the bankruptcy proceeding and any disciplinary proceeding that you want to us it.

MR. KUBY: Yes. And I suppose I would just like to include the first two preliminary pages so whoever sees this knows what they are looking at.

THE COURT: All right.

MR. KUBY: Thank you.

THE COURT: We will do it on that basis and the balance will be sealed.

You can tell Judge Cyganowski that's the resolution that was made here today. If she wants any portion of the document, including page 6, which is separately removed here when she sent it to me, I will tell Miss Giangarra to seal it on that condition.

MR. KUBY: Fine, Judge.

THE COURT: All right.

Where is Mr. Pappas?

THE CLERK: Judge, they are supposed to bring him up.

THE COURT: Well, I know, but they are guarding him outside apparently.

(Defendant Dennis Pappas enters courtroom.)

THE COURT: Now, Mr. Ryan, I thought we have a preliminary question. I don't know to what extent any of these motions involve anything that you feel must be protected, but there are a fair number of people in this courtroom who I don't believe have requisite clearance to hear anything that you want to be protected.

MR. RYAN: Judge, I believe that you're correct that most of the motions really will not impact on any issues of classified information, except for perhaps certain discussions involving the application by the defense for a modification of the CIPA order or questions related to classified discovery. Other than those areas we believe the

remainder of the calendared motions can proceed in open court.

THE COURT: Are you going to assume the burden of letting me know when we are at that point when we should make these critical decisions about removing people from the courtroom?

MR. RYAN: Yes, Judge. If Mr. Kuby will inform us, since he is aware of the scope of the CIPA protective order, that he wishes to raise information concerning national security, then we should be able to take appropriate steps at that time.

MR. KUBY: That's fine, Judge. In fact I think that it may be possible to deal with the protected areas at a sufficiently general level that may not be necessary to close to courtroom at all. If it does become necessary I will certainly not speak until I inform the Court that we are going into a protected area.

THE COURT: All right.

I will take these up in my order or would you take them up in what you have jointly agreed on the order to them up?

Since the government has the burden of proof here in proceeding, maybe you should tell me what issue you want to discuss first on these many issues. Do you want me to list the issues?

MR. RYAN: Judge, if you might, because then we would all have a common understanding of exactly what is currently pending.

THE COURT: All right.

I am going to list them in the order — chronological order I guess. The jury questionnaire is number one. But that I think is a — Mr. Kuby has requested to disqualify Mr. Ryan. The government's in limine motion. Mr. Kuby requested that the Court direct the government to cease interference with Mr. Pappas' First Amendment right.

There is a — I have a request from a third-party, the Daily News, to unseal all civil actions. Mr. Pappas' motion to release unreasonable bail conditions. The question of outstanding discovery matters.

The government's order to show cause why Mr. Kuby should not be held in contempt. And Mr. Kuby's motion to partially vacate the supplemental protective order, and the government's request to stay the civil action.

Are there any of those that we can say we need to have no discussion on or must we discuss them all?

Let me begin with – let me take up the first one first. I sent back a revised jury selection questionnaire to everybody about two weeks ago and I haven't heard a peep from anybody. And if I apply

the usual rule that silence is golden and obviously nobody objects.

MR. RYAN: Judge, we have reviewed that and we have no objection to the jury questionnaire in the form posed.

MR. KUBY: Judge, I need a moment with respect to that.

THE COURT: All right.

MR. KUBY: If we can just return to that

THE COURT: We can return to it. Indeed, as long as you get — one of the key problems here, Mr. Kuby, is speed.

MR. KUBY: Yes.

THE COURT: One of the things that is going to delay this trial more than anything else on this rather extensive list is the jury selection process that we have agreed upon. The first step is, of course, the agreement upon when the questionnaire. So you've got to get me your objections, maybe after lunch today, so that we can try and iron them out.

MR. KUBY: Yes, Judge. My primary difficulty with the questionnaire as written is it omits those areas that relate to the protected areas.

Now in part it may do so because you have yet to rule on the government's motion in limine.

THE COURT: Well, the government's motion in limine we'll reach today. I don't have too much of a problem. You and I are far apart on the limine question. And that is one reason why I have not put any of those — I don't think it can be a jury question, but I can explain it later on.

Apart from that have you got any specific questions you want to raise about the questionnaire?

MR. KUBY: I do not.

THE COURT: All right. So we will hold that.

Okay. The government's motion. What's the next one which you want to take up?

MR. KUBY: Well, Judge, what I would add really to the list is – it effects all the motions, which would be the scheduling of the pretrial hearing.

THE COURT: I am available next — starting on Monday of next week and you've got my undivided attention, notwithstanding the fact that my boss here says she's going to have some civil cases. At the moment, bring your witnesses in and we will start on Monday.

MR. RYAN: Because I think, Judge, many of the issues that are presented here would actually be cured by starting the pretrial hearing as quickly as —

THE COURT: Well, now, the pretrial hearing, is it — let's clarify what you're seeking. Is this a CIPA hearing?

MR. RYAN: This would be a CIPA hearing.

THE COURT: And in the CIPA hearing you're going to — the two of you are going to argue over what is protected and what is not.

MR. RYAN: And also. Judge, the claim of a promise would be able to be developed because that occurred within the context of classified conduct

THE COURT: Let's assume arguendo that Mr. Kuby wins on his portion of the motion which says that the Second Circuit has held that anything that antedates the filing of the indictment here, that Mr. Pappas and/or his — whoever transferred them, is not subject to the CIPA statute, but ala Judge Newman.

MR. RYAN: Well, Judge, you really can't decide that now because —

THE COURT: Why can't I decide that question now? That's one of his motions.

MR. RYAN: But it was returned from the Second Circuit to your Honor for development of the factual basis for the claim of contract. And also, in addition, submitted in our memorandum yesterday are additional contract grounds and legal grounds upon which Mr. Pappas is bound not —

THE COURT: So this will be the first part of the hearing.

MR. RYAN: No, Judge. That would probably be the last part of the hearing.

THE COURT: Wait a minute. That doesn't make any sense.

MR. RYAN: Well, what we –

THE COURT: That doesn't make any sense at all. If I am going to decide this contract question in Mr. Kuby's favor — listen to me for a minute, then we don't need any CIPA hearings with respect to documents and whatever because if I decide in his favor everything will be open.

MR. RYAN: Well, that is not true, Judge, because while Mr. Pappas under the CIPA hearing, under the contract question, the Court is concerned with what he learned prior to —

THE COURT: Well, virtually everything that is involved here is sought to be protected is what he knew prior.

MR. RYAN: It's not in the documentation and the discovery that is available. Many of those things he did not know prior.

THE COURT: He didn't.

MR. RYAN: Did not know.

THE COURT: Well, have you attempted to sought out what is what here?

MR. RYAN: That's correct. We have, Judge. That is something that can be handled within the context of the hearing and would be subject to a factual determination.

THE COURT: The hearing is going to take forever and a day the way I see it anyway. But let's get started on it. I think that the first order of business is to determine to what extent there was some sort of a contract made by an authorized person with the government with Mr. Pappas, that he would protect information back when he was allegedly working for the government.

MR. RYAN: That's correct, Judge. And I withdraw my earlier remark. The conversation between Mr. Pappas and the agents and whatever agreement flowed from them would have to be of necessity the first subject of the hearing.

THE COURT: Good. And you are going to disagree to it.

MR. KUBY: No, I am not going to disagree, but I just wanted to be clear what it is we are going to be doing first.

The government has brought a civil action to enforce the secrecy contract that they claim —

THE COURT: The civil action is not in my thinking at the moment and I am not going to – civil actions await the outcome of criminal actions.

MR. KUBY: Well, Judge –

THE COURT: And he proposes to put before the Court what the government regards as a contract made between your client and one or more representatives of the government to protect this information that they gave to him.

As I understand Judge Newman's order that is one of the things I should resolve before I say, as he seems to think, that CIPA doesn't apply.

MR. KUBY: No, Judge.

THE COURT: And Judge Newman –

MR. KUBY: I am sorry. Judge Newman made it clear both in his decision and in the denial of the motion for a rehearing that the Classified Information Procedures Act does not cover information that Mr. Pappas received from government sources prior to the initiation of the criminal proceedings. The question that Judge Newman left open in the Second Circuit is whether or not Mr. Pappas' secrecy and the abridgment of his First Amendment rights could still be maintained on the basis of some sort of contract theory. He remanded the case back to the Court and the Court directed the government to file their civil contract action if they wished to —

THE COURT: I didn't direct them to file anything. I said that they had to show that there was such a contract and it was enforceable. They chose to proceed in that fashion.

Now they say that I shouldn't proceed in that fashion. They want to prove it in a pretrial proceeding. That is what he just finished saying. That's the first order of business.

MR. KUBY: That's right. And the problem though, Judge, is they can't prove the existence of that contract in a pretrial criminal proceeding because, as I briefed about a month and a half ago, this — and the government never again said this Court doesn't have jurisdiction in a criminal case to issue a gag order against Mr. Pappas based upon a contract theory. This Court would only —

THE COURT: I don't know what the contract is. I am trying to determine what it is that they think constitutes a contract. There are various things that have occurred here in addition to the conversation with the office – alleged conversation with the government agent.

There is something that — well, one or more documents he did sign at one point in the early stages of this proceeding, with respect to the protection that you term, is the determination of whether or not that protects a pretrial pre-CIPA – I am sorry, pre-indictment material and it's still open.

MR. KUBY: Well, Judge –

THE COURT: And these are the questions I think that we are going to lay out on the table and I have to make certain determinations.

MR. KUBY: That's correct. Judge. But let's just set aside for the — for the memorandum of understanding that was signed here in February because that is under – Mr. Ryan raised it, and amazed me, for the first time yesterday when I got his answering memorandum. And so if we set that aside for a moment and sort of discuss what we had on the table before yesterday.

THE COURT: Well, do you — are you at least willing to concede that everything that postdates that memorandum that he learned is protectable?

MR. KUBY: Not only is – well, everything that Dennis Pappas acquired from the government after the initiation of the criminal charges is not only protectable, it is protected. It is covered by this Court.

THE COURT: That is a big concession. So then the sole question is prior to the indictment, if he learned anything, he's going to have to show me what there was by way of a contract, which I may say is zilch. That's the end of that. Then you are way ahead.

MR. KUBY: Yes.

THE COURT: And don't fight it.

MR. KUBY: No, I like to be way ahead, especially here, and I wish to stay away ahead. I just want the Court to be clear though that the only way this Court has jurisdiction to pass on the contract issue. The way the contract issue —

THE COURT: Look, Mr. Kuby, I have to make an initial determination on this question whether there is enough to submit it in some fashion to a jury.

I'm not so sure that it's even admissible to a jury, but they've got to at least show me what it is that they say formed the contract that protected this stuff. If they don't show that to me, you may be able to take everything and go out and publish it in the New York Times tomorrow. You probably won't publish it there, but you may publish it anywhere you want

MR. KUBY: Newsday perhaps.

THE COURT: Newsday.

MR. KUBY: I understand that, Judge. But the hearing that Mr. Ryan has been discussing and the hearing that I am talking about and the hearing the Court is talking about are I am afraid three different hearings.

THE COURT: No, it isn't. I know what I need to know whether it was the formation of a contract that would invoke the secrecy here. So let's do it my way and at least take the preliminary testimony on this alleged contracts first.

MR. KUBY: We can do that, Judge, and obviously, is you know, I have no objection to that. But I just want the Court to know that the –

THE COURT: You object to my making the determination that there was a contract if there was a contract. We'll discuss that when we get to the end of the evidentiary material.

MR. KUBY: I understand that, but that's — I mean pursuant to the government's contract action, I have noticed depositions. I made requests for civil discovery.

THE COURT: Well, I am not going to allow that civil case to go head at this point.

MR. KUBY: In that case, Judge, if you're going to stay the civil action, then the Court, this Court does not have jurisdiction in the criminal case.

THE COURT: Oh, Judge Newman didn't say I didn't have jurisdiction.

MR. KUBY: No, he didn't. He left it –

THE COURT: I still have jurisdiction of this question, Mr. Kuby, at least as a preliminary matter.

MR. KUBY: Well, as a preliminary matter of course all courts have jurisdiction to decide their jurisdiction. And Judge Newman quite expressly left the question opened. He said since the parties didn't brief it we don't decide whether a civil action is required.

That is why I responded to Judge Newman, I believe it was in September, with a memorandum of law explaining why it was in my belief this Court did not have jurisdiction in the criminal case to issue a gag order based on a pure contract theory.

Mr. Ryan never responded.

THE COURT: But at the moment his opinion says I should hold a hearing to determine whether there was such a contract or arguably there was such a contract.

MR. KUBY: Yes.

THE COURT: That's what we are going to determine.

Now let's get on to the next aspect of it. Assuming arguendo that at the end of that hearing I say there's no contract here or this is not an enforceable contract, or words generally to that effect. Then as I see it we don't have to have a document — a further document CIPA discovery, except as to anything that's post indictment.

MR. KUBY: That's correct.

THE COURT: Okay. Good. We are on the same wave length. Don't destroy it.

MR. KUBY: Should I sit down now?

THE COURT: No, you can stand up as long as you want. But I am going to ask you what's the next topic on that basis.

MR. KUBY: I think the only other question is in terms of setting a date for that first piece of the hearing.

THE COURT: Monday, right?

MR. KUBY: I have to sum up in my murder case in Brooklyn.

THE COURT: Who care about the murder case? I mean we are here with your Pappas case. Send in Mr. Perez or send in the second team to sum up.

MR. KUBY: As I indicated – as Mr. Ryan indicated, he would be prepared to go forward on December 2nd with that part of the hearing. I of course will be prepared to go forward.

THE COURT: You want to take the blame for this week's delay that you've been pinning all the time on the government.

MR. KUBY: Absolutely. I will take — and I will say this on the record, the full responsibility for the period of delay between next Monday and the following Monday. Those seven days are on Mr. Pappas.

THE COURT: They're not on his back. It's on your back because he's not responsible for it.

MR. KUBY: But he's the one in jail, so he has to do the time. So ultimately it does come out of his chit, not mine.

THE COURT: But it's on your back. Okay.

MR. KUBY: And I just want to –

THE COURT: Now wait a minute. So we agree it's agreeable we'll start on the following Monday, Mr. Ryan?

MR. RYAN: The government is ready and has been. We will be happy to start on the 2nd or any date the —

THE COURT: December 2nd.

MR. RYAN: Or any date that is convenient to the Court.

MR. SPIEGEL: I would request that I be heard for a moment.

THE COURT: Yes.

MR. SPIEGEL: It appears to me I will not be required at this hearing. In fact I may be prohibited from attending this hearing.

THE COURT: Why?

MR. SPIEGEL: Well, I have no national security clearance whatever.

THE COURT: Well, wait a minute. I cleared Mr. Ruby for the purpose of attending this hearing. And you've got something in your closet I should know about?

MR. SPIEGEL: No. It's that I have a murder trial myself which is before Judge Bamburger that is two and a half years old with an incarcerated teenager beginning on this coming Monday and I certainly do not believe we will be finished by the following Monday.

THE COURT: Make Judge Bamburger sit on Thanksgiving. Tell her I said so.

MR. SPIEGEL: I think we may be doing that regardless, given the age of this case. We are on constitutional speedy trial thin ice at this point and she's very anxious to go forward.

So I have a problem attending. Moving back from that, it's not clear to me that my client is going to be involved.

THE COURT: Do you have somebody else who could attend?

MR. SPIEGEL: I'm afraid I don't. I am a sole practitioner. But it is my view that the — my client is involved insofar as any contract which would be established would protect her as well based on what I've read in the papers provided by Mr. Ryan and Mr. Kuby. My client would be protected by any such contact.

THE COURT: Did she participate in any of those conversations?

MR. SPIEGEL: She didn't participate. I'm sorry. Perhaps I am talking about two different elements of the contract.

My client would have been protected by any assurances that Mr. Pappas received that he would not be prosecuted nor would his wife if in fact that is shown. But if that is not the subject of this hearing, then I don't see how my client would be involved. She was not, as far as I know, involved in any conversations whatsoever.

MR. KUBY: It is my understanding that the of the hearing that we are going to commence on the 2nd is whether Dennis Pappas made a promise to the government that in exchange for being given information he would keep it secret. Those are the parameters of the hearing.

THE COURT: That doesn't involve his client though.

MR. KUBY: Right.

MR. RYAN: Judge, the base of the evidence though is such that the conversations and the contact between the agents is such that the entire contact of what Mr. Pappas agreed to do in connection with whatever representations were made is discussed essentially at the same time. You really can't separate one from the other.

THE COURT: We are not trying to separate anything. I'm trying to find out whether I need to have this attorney present.

MR. RYAN: Mr. Spiegel has previously indicated on the record that his —

THE COURT: He just doesn't want Mrs. Pappas' name to creep in here without his knowing about it.

MR. RYAN: The government has no evidence that Mrs. Pappas is involved at all, except for the representations by the defense that the promise of non-prosecution extends to her.

MR. KUBY: Judge, excuse me. The issue of the promise that the government made to Mr. Pappas regarding non-prosecution is most emphatically, according to my understanding, not the issue we are taking up on the 2nd. The issue that we are taking up on the 2nd deals solely, to my understanding, was the promise that Mr. Pappas allegedly made to the government.

If we are going to set a date —

THE COURT: Well, now wait a minute. First of all, this is what we are trying to find out right at the beginning, whether there was any such promise back and forth that you have just suggested. Is Mrs. Pappas involved in that in any way?

MR. KUBY: Mrs. Pappas is not involved in any promise to Dennis Pappas made to the government to keep the information secret.

However, Mrs. Pappas would certainly be covered by the promise the government made to Mr. Pappas in exchange for his employment that neither Dennis Pappas nor his wife would be prosecuted.

THE COURT: Well, he's going to be delighted with that. I don't see that he's going to be arguing with that.

MR. SPIEGEL: Not at all.

THE COURT: Okay.

MR. KUBY: I just — and I hate to interrupt.

THE COURT: You are being asked — the record is being transcribed. You can read it. If you feel that at the end of it when you are finished with your murder trial before Judge Bamburger that you want to reopen for a limited purpose, we'll reopen it.

MR. SPIEGEL: Thank you very much, Judge. I think that would be entirely satisfactory.

MR. KUBY: I just want to be clear that the only thing that I am going to be prepared to deal with on December 2nd is the issue of Mr. Pappas' alleged promise to the government to remain secret.

If we are going to go into the larger hearing regarding what the government promised Dennis

Pappas in exchange for his national security work, the scope of the project, I have dozens of subpoenas I have to get out. I need three weeks or four weeks lead lime and I need most importantly the classified discovery that Mr. Ryan has repeatedly said he's provided, but in fact comes back and says he hasn't provided.

I mean I'm trying to do what the Court wants to do, which is to –

THE COURT: I'm trying to do what you want to do. You are the one who's saying that everybody is holding up the war except for you. Now you want to put off the hearings. I thought everybody was ready for this.

MR. KUBY: Judge, the reason I can't be ready to do the larger hearing on the question of Mr. Pappas — what promises were made to Mr. Pappas in reference to the national security project is that Mr. Ryan, despite your direction on July 18th that he provide the Court with all classified discovery, he did not do so. Despite the –

MR. RYAN: Objection.

MR. KUBY: - the direction on August 7th, he stood up in front of the Court of Appeals and said he's provided everything to Judge Platt. He in fact did not do so.

THE COURT: How am I going to resolve this? By putting the two of you on the witness stand and let you each swear to the contrary.

I mean what do you suggest I do? They have been told to put everything in a room that is available to you at any time. And they say they have done this.

MR. KUBY: Judge, that is the nonclassified discovery. That is not the issue that we are discussing right now. The question of the stuff in the room has absolutely nothing to do with the topic in front of the Court.

On September – at the September 19th hearing, I told the Court at that time I have not received everything. And I sat down with Mr. Ryan and explained what classified discovery was still outstanding based upon the two classified affidavits I was permitted to see.

The Court said fine and suggested that I file with the Court a list, which I did ultimately file it on September 24th. It was filed under seal.

THE COURT: I don't think I saw it.

MR. KUBY: It specifically detailed the category.

THE COURT: Oh, I see it. It's on your letter of September 24th. Oh, I have that.

MR. KUBY: The one with the big red thing on the top of it.

THE COURT: Yes. Okay.

MR. KUBY: And I said –

THE COURT: Well, have you sat down today and will you sit down at lunch and point to the various documents here that have not been produced with Mr. Ryan and he can produce them?

MR. KUBY: None of those documents have been produced with the exception of the two affidavit which I saw only in part.

That's all that has been produced in terms of the universe of available and relevant classified discovery, the universe of everything that this Court mandated that we get it in July and again mandated that we should get it in September.

Out of that universe of everything, two affidavits have been submitted. That is why in September I submitted that letter explaining what I meant by everything in sort of detail. Mr. Ryan has never responded to that letter, except last night he said, oh, yeah, there is more stuff and I'll get it at this hearing.

Well, that is just not what this Court has ordered.

THE COURT: Why can't we have it here this afternoon?

MR. KUBY: Pardon me?

THE COURT: I am looking at Mr. Ryan. I am asking why we can't have all this material this afternoon.

MR. RYAN: Judge, you have that material. That material was in the possession of the Court since July 23rd.

THE COURT: Everything here?

MR. RYAN: Everything there. Well, everything that exists. There are many things that Mr. Kuby requested that do not exist. Everything is classified.

THE COURT: So you and Miss Giangarra will go to the seal material and you say — I assume it's under seal and we will produce it here this afternoon and give it to him.

MR. RYAN: No, Judge, because we oppose – as the subject of the CIPA hearing he requested this material for cross-examination of the agents who he claims allegedly made the promise of non-prosecution because it was such an important project that they would have naturally lied to Mr. Pappas and offer him a non-prosecution promise in order to effect the project.

The things that he's asking for go way beyond what the discussion was. Under Section 6 —

THE COURT: You can't make a determination as to the extent of his cross-examination —

MR. RYAN: Judge –

THE COURT: - of the agents.

MR. RYAN: Exactly. At this point we can't. That is why we believe that the question of the scope of classified discovery has to wait until the direct examination of the witnesses is heard.

THE COURT: No, no. This is a nonjury trial and we are not — this isn't production of 3500 material as to the end of the –

MR. RYAN: Judge, many of these things are going to be used essentially for 3500 material.

THE COURT: You're going to produce them now.

MR. RYAN: Some of them. Judge.

THE COURT: All of them.

MR. RYAN: Judge, some of them are of such sensitive national security matters that we would have to offer –

THE COURT: Under the CIPA –

MR. RYAN: Offer a substituted –

THE COURT: Then offer a substitute.

MR. RYAN: A substituted stipulation of fact on certain items. And that is something we are

willing to discuss with counsel. But it is something that has to be done in order to effect national security because most of the items he's asking for are not —

THE COURT: According to Judge Newman all of this material was discussed with Mr. Pappas before the indictment.

MR. RYAN: No, Judge.

THE COURT: And it is not –

MR. RYAN: Judge, you're mistaken. The items that Mr. Kuby seeks were not subject of discussion with Mr. Pappas. They are additional documentary discovery as to a wider scope, national security projects of the F.B.I. They were not — never discussed with Mr. Pappas. Mr. Pappas is unaware of them. They indicate – they provide foreign sources of information of things that were never —

THE COURT: If he's so unaware of them how come he can recite what they are in the book?

MR. RYAN: Because Mr. Kuby is familiar with the process by which the F.B.I. obtains court ordered authorization to do these types of projects. Many of these are standard forms that exist in a national security investigation. And those items are well outside the scope of what Mr. Pappas has claimed to have known or actually did know.

And the scope of what Mr. Pappas's knowledge is, Judge, is something that can be covered within the CIPA hearings. So that your Honor can see that most of what Mr. Pappas is seeking here is well beyond any legal relevance or materiality, but is merely an attempt to gray mail the government or to try to make public things of national security that he's not entitled to under any circumstances.

MR. KUBY: Judge, first of all, making public is absolutely not the issue here. That is not what I'm discussing. What I'm discussing —

THE COURT: I know what you're discussing. And none of this is going to go beyond you and Mr. Pappas.

MR. KUBY: Right.

THE COURT: It's going to be used in this courtroom.

MR. KUBY: Right.

THE COURT: I have already told them there is no protection for that.

MR. KUBY: Right.

THE COURT: And so I'm not going to let him get away with that. They are going to have to produce it here this afternoon and I am going to hand it over to you for your use, period.

MR. KUBY: Thank you.

THE COURT: In this proceeding.

Mr. Ryan, I have cleared these two gentlemen and they are going to be able to use it.

MR. RYAN: Judge –

THE COURT: They are not going to be able to reveal it to anybody outside this case.

MR. RYAN: Judge, we have no objection to providing to the defense with classified material that is relevant to their claim. We take strong objection –

THE COURT: All right.

MR. RYAN: – to anything else.

THE COURT: The first order of business this afternoon is you're going to produce it here and we'll discuss the relevance of each of these items as we go down.

MR. KUBY: Fine, Judge.

THE COURT: That we'll do. That's the first order of business. We are not going to start this hearing adjourn it for two months while we wait on the — there's no point in our even getting into this question of the jury questionnaire and so forth and impaneling a jury if we are going to take two months to go over each document.

It's his choice. You say they are not relevant. I will have to make a determination as to whether they are relevant document by document. I don't see any other way of doing it.

Do you have a better solution?

MR. KUBY: No. I think that is what the Court mandated back in July.

THE COURT: All right.

This would have been sealed about the 24th of September. No. When did you produce these documents?

MR. RYAN: Judge, the documents were produced for an in camera examination on July 23, 1996.

THE COURT: Well, when we adjourn here in about 15 or 20 minutes you go with Miss Giangarra and — if necessary and find the documents, the envelope in which these documents –

MR. RYAN: Judge, they are in the court safe in the — in the secured safe, Judge.

THE COURT: They are?

MR. RYAN: They are. They have been in the secured safe since they were delivered.

THE COURT: She doesn't have them.

MR. RYAN: No, the court security officer or your clerk would have access to them.

THE COURT: That means Mr. Londergan has them. So you go with Mr. Londergan and get them and produce them here today.

Okay.

MR. KUBY: Yes, Judge. Two things, so we are completely clear.

I believe what Mr. Ryan is referring to is two affidavits which I have already seen. Not all the other documents.

MR. RYAN: No, Judge.

THE COURT: He says he produced everything.

MR. RYAN: We produced –

MR. KUBY: Fine.

MR. RYAN: We produced much more.

Mr. Kuby has made representations that I lied to the Second Circuit, to this Court about delivery of the secured documents relevant to this case. In fact we have delivered them on July 23rd.

THE COURT: No, no. You both have been making wild accusations about each other.

MR. KUBY: We'll stop, Judge.

THE COURT: That's nice. When will you stop, during my lunch hour?

MR. KUBY: We'll try.

MR. KUBY: Despite the fact that I generated that September 24th letter, because that letter itself contains classified material that I didn't know before, Mr. Pappas didn't know before. I don't have a copy of it.

So if we do this line by line on it, I am going to have run back and forth to the bench because I am not permitted to keep a copy of that letter even though I wrote it. It was written by Mr. Perez in the — on the secured computer and only Mr. Ryan has a copy.

THE COURT: Do you have an extra copy of the letter that you can give him so we can discuss this intelligently?

MR. KUBY: Pardon me, Judge?

THE COURT: I'm looking at Mr. Ryan and asking him whether he has an extra copy of this letter so we can discuss it intelligently.

MR. RYAN: Judge, if I don't have an extra copy we'll share a copy.

THE COURT: No.

MR. RYAN: I will make an extra copy for him at lunch.

MR. KUBY: Thank you.

THE COURT: Okay.

MR. KUBY: I will give it back to Mr. Londergan at the end of today.

THE COURT: Okay. So that's the first order of business. One is we start discussion on the relevancy and hopefully we'll get the thing finished this afternoon. But if we don't we'll have to carry it over to - when are you going to be free from your murder trial?

Everybody is involved in a murder trial except me, knock on wood.

MR. KUBY: We can change that if you want.

THE COURT: No, I don't want to.

MR. KUBY: December 2nd.

THE COURT: No, but I mean – this Monday?

MR. KUBY: I mean we will be –

THE COURT: So you could resume this portion of the hearing next week.

MR. KUBY: No. I'm saying that we begin the defense case summation and charge next Monday in

the murder case. That should take us through Wednesday and then the next day I am free would be December 2nd. And I will be available December 2nd.

THE COURT: Okay, I understand.

MR. KUBY: Through the 4th.

THE COURT: Once you are in here you are not getting out.

MR. KUBY: Well, let me just - depending on what we do I just want to tell the Court that I have confirmed plane tickets for the 5th, 6th, 7th, 8th and 9th. I'm speaking at the Kansas Trial Lawyers Association.

THE COURT: Well they may have to do without you.

MR. KUBY: Well, we'll talk about that.

THE COURT: Okay.

After that preliminary work on this contract question, what next, Mr. Ryan?

MR. RYAN: I believe then we can proceed into the question of whether there was a promise or representation of non-prosecution, followed by the defendant's claim of interference with his Sixth Amendment right and —

THE COURT: Well, why can't we discuss the interference with the Sixth Amendment right right now?

I mean this is all tied into the — this is tied into this question of what I'm going to — whether I am going to say there is any contract here and whether or not everything is wide open.

MR. RYAN: It's factually related, Judge. We can talk about the interference of Sixth Amendment right now if –

THE COURT: I mean is this going to depend I suppose on whether there was a contract or not.

MR. RYAN: Well, the claim of interference with a Sixth Amendment right is somewhat — it is related, but somewhat independent of whether there was a contract or not.

THE COURT: How come?

MR. RYAN: Because –

THE COURT: If there was no contract, then you probably have interference.

MR. RYAN: No, Judge. How the question of who represented — the question of whether or not –

THE COURT: Oh, you're talking about - I am thinking about First Amendment.

MR. RYAN: Sixth Amendment.

THE COURT: Yes. Well, okay. That is a follow on hearing I suppose.

MR. RYAN: And that leads both factually and the — and the events of this case would make that the next issue in consequence as well.

THE COURT: Do you agree?

MR. KUBY: Yes, I do.

THE COURT: I mean the government witnesses like Mr. Scaring and what have you I suppose.

MR. KUBY: Right. With respect to both, yes. I have about a dozen witnesses.

THE COURT: On that point?

MR. KUBY: On that point and a certain earlier point about the non-prosecution issue. The issue of Mr. Pappas' promise to the agents when he was given the information, that is discreet in and of itself.

But the other issues have a lot more witnesses and I need some lead time to go track them down.

THE COURT: Then you better start lead timing yourself over the weekend while you are eating your turkey on Thanksgiving Day.

MR. KUBY: Yes, I understand. But, you know, as a practical matter, Judge.

THE COURT: Can we decide that there is no basis to hold Mr. Kuby in contempt in view of his claim that he has – he was unaware of the sealing of the Steiger affidavit?

MR. KUBY: I'm for that.

MR. RYAN: Judge, that is a question that I would not be able to make a sole determination on at this point. I would have to consult with my office based on his representation.

THE COURT: Well, we are going to get into a rather extensive attorney — collateral attorney status question here if we have to make it — if we have to go into determining what Mr. Kuby knew and how soon.

He came into this case, as I recall, in December or January.

MR. KUBY: That's correct. Judge.

THE COURT: And all of this sealing and what have you was on many months before.

MR. RYAN: Well, Judge, copies of the order were distributed to all parties at the time it was signed. And then Mr. Kuby had since made approximately five motions made on that same bail hearing. So we —

THE COURT: I know, but –

MR. RYAN: We have some difficulty.

THE COURT: But nobody has really treated the contents of the Steiger affidavit, including myself, as secret when we were —

MR. RYAN: You're correct, Judge, it was sealed, but not secret.

THE COURT: Well, all right. But it was protectable to you because the government made reference to the Steiger affidavit. I've made reference. I don't remember whether he did or not, but I know both of us did with the papers that were filed with the Court of Appeals.

MR. RYAN: I think the protective interest in the affidavit were the description of the various confidential sources, which was not subject —

THE COURT: Yes, but what I'm saying is nobody said to either me or to Mr. Kuby at the time that we were using it in the bail hearing that it was ever sealed and that those excerpts had to be protected.

MR. RYAN: Judge, it was — there was a written order already on the docket and the only people that were using it were using it in connection with the detention hearing, which is what it was unsealed for.

THE COURT: Well it was unsealed, but nobody – there was no formal unsealing, so to speak. It was using it in a different way.

MR. RYAN: It was formally unsealed by written order, Judge, and limited — you yourself limited it to counsel at the time. We requested it be unsealed for limited purposes.

THE COURT: So why shouldn't he have been able to use it?

MR. RYAN: For the detention hearing, we had no objection. But when it was the entire document, including the description of confidential sources, was distributed in public to various people —

THE COURT: I think you have it all back with the aid of Mr. Dahlman.

MR. RYAN: Yes, but with – we got it all back after two orders to show cause, Judge.

THE COURT: Well, I'm going to hold that in abeyance. I don't think we have to resolve that at the moment.

I have indicated I am not going to proceed with the civil action, at least not until we've dealt with these hearings, certainly not the first two hearings that we are going to hold.

Now, Pappas' motion for release on reasonable conditions.

Oh, let me just ask the government before we get down to that thing. I have this request by a nonparty that I unseal all civil action filings.

I think I am correct in saying that the only two filings that there are is a complaint and your request for discovery.

MR. KUBY: In terms of the filings there was a complaint and an answer with counterclaims, a letter in opposition to the government's motion request for a stay, the government's request for a stay. I have also submitted notices of depositions and requests for discovery.

And offhand I don't know if they were actually filed with the Court or just served on opposing counsel.

THE COURT: I think I saw them. I think they were filed with the Court.

MR. KUBY: Fine.

THE COURT: Is there any reason why with just a little black ink you can't redact appropriate portions of the — agree on the redaction and the balance of that civil action.

MR. KUBY: Absolutely, Judge. There is one sentence in the government's complaint that is repeated several times in the complaint that falls within the scope of this Court's March 5th protective order. I have repeatedly requested that that be redacted. I drafted my answer and counterclaim in a fashion that did not have the level of specificity that would trigger the order.

Mr. Londergan at one point suggested to me that in drafting these things, if I have a choice between writing a document that includes classified information and writing one that doesn't, I should probably write one that doesn't. Just on the general principle that the fewer pieces of classified information floating around out there the easier everybody's job is. And that's what I did in my answer.

THE COURT: I am going to have the three of them, Mr. Londergan and the two attorneys, between now and a week from now, see if they can't redact anything and put a redacted copy in the file and we withdraw the balance.

THE CLERK: That's the civil case?

THE COURT: Yes, we are talking about the civil case.

THE CLERK: All right.

THE COURT: There doesn't seem to be that much to be redacted.

Have you read these things, Mr. Londergan?

MR. LONDERGAN: No, your Honor.

THE COURT: Can you spend a little time up here next week with Mr. Ryan and —

MR. KUBY: I'm sorry, Judge. I am confused. I thought Mr. Londergan would have to have them

in terms of the Court's order because in Mr. Ryan's complaint it contains classified information.

THE COURT: Which he said it did.

MR. KUBY: Which it does.

THE COURT: He said it did.

MR. KUBY: I am –

THE COURT: He said that the complaint – I have not read the complaint so I can't verify whether it does or not. I asked Mr. Londergan whether he's seen it. He asked that they be put under seal—

At the moment they are under seal, but I am going to try to get them unsealed once they are redacted.

MR. KUBY: Right. I just don't understand that if they do contain classified material they need to be redacted. If they do not contain classified material they shouldn't be under seal.

THE COURT: That may be open to the public. I don't – you yourself say they may have – redacted some classified material. The complaint has, you say, one line.

MR. KUBY: That's why I was surprised because this Court required all classified filings be made to the court security officer.

THE COURT: They were put under seal. I don't think they have been filed with the court security officer yet because nobody had a chance to go in and determine whether they are – there is classified information.

Furthermore, it seemed to me that probably there wasn't any and I didn't want to get into that category unless I had to.

MR. KUBY: Fine.

THE COURT: And it looked like whatever is going to be classified is going to be minimal.

Okay. So then we have the — Mr. Pappas' motion to be released on reasonable bail. We've got about ten minutes. We'll have to take this up at 2:00 o'clock, but it's your motion.

I have read your papers. As you know we have been through this act. This is not deja vu. This is double deja vu. But I guess you can continue to make motions.

MR. KUBY: If I may just have a moment to find the right folder.

THE COURT: Sure.

Since you're co-counsel in the bankruptcy I proceeding, I take it, you're prepared to say to me that even if I were to be moved to impose the Orena kind of conditions, you wouldn't be in a position to pay for them.

MR. KUBY: That is not entirely true. Mr. Pappas obviously in terms of his own assets would not be in a position to post any of them, but he's in a position to put together essentially the same bail package that was submitted to this Court in his two prior applications.

THE COURT: No, I am not talking about his prior application. I am talking about if I were to impose — what was it, Masotto or Orena type of conditions in a bail package which involves a considerable amount of expense on the part of the defendant to maintain himself in accordance with those conditions, since he has filed for bankruptcy and assuming arguendo that everything he's alleged there is true, he will probably not be in a position to meet any such expenses.

MR. KUBY: Judge, I don't know what those expenses would be. I know two things however. One is as to whether any of Mr. Pappas' assets could be used for those conditions would of course be — have to be taken up with the bankruptcy court.

But number two, I have —

THE COURT: I am reasonably certain that is going to be so. But the question would be whether he's in a position perhaps to raise money from outside sources, about which I may not inquire, but to meet the financial —

MR. KUBY: Yes, I feel quite certain that both Mr. Pappas' wife, Andrea Pappas, as well as Mr. Pappas' many dear friends would be more than

happy to make whatever contribution was necessary to pay the cost of the sort of Masotto/Orena type restrictions: the bracelet with the monitoring, all the rest, whatever conditions – whatever conditions the Court imposes.

THE COURT: You're playing pretty fast and loose with your client's money.

MR. KUBY: Well, my client –

MR. SPIEGEL: Me, your Honor?

THE COURT: Well, didn't you hear what he said?

MR. SPIEGEL: I did hear what he said. But I have had no discussions with my client regarding this and I don't think I –

THE COURT: I wanted to make sure you are awake.

MR. SPIEGEL: I was awake, indeed, your Honor, although there are often times I think I might be better off.

THE COURT: You can have words with him after we recess in about five minutes. I wanted to make sure you understood what he just represented to me.

MR. SPIEGEL: Thank you for your concern. Judge.

THE COURT: That's all right.

It's your money, as they say, not mine.

MR. KUBY: Certainly, Judge, any conditions that the Court were to impose, we would do our best to raise through his friends and colleagues. Obviously the cost at some point could easily become prohibitive. If what the Court is actually talking about is private financing of 24-hour a day guards, to the tune of ten thousand dollars a week, I mean that would not be possible. But any sort of –

THE COURT: Well, I mean this is — I suspect if they are going to acquiesce in anything at all, other than another trip to the Second Circuit, it would be on what they call a Masotto/Orena type conditions which were pretty expensive even for those gentlemen.

MR. KUBY: Well, if the government is willing to acquiesce in Mr. Pappas' release, then — and that is if such staggering proportions of —

THE COURT: No, it is not exactly a release. The conditions in those cases - in those cases, if you examine them carefully, did involve a hiring by the government of what they thought were appropriate guards and so forth at Mr. Pappas' expense. And the expenses were not insubstantial.

MR. KUBY: Again, we would have to see what specific conditions the government would request and how expensive it would be.

THE COURT: Which even apart from the government's request, if I impose — I am assuming that I am going to get the usual big n-o from the government.

And I'm trying to find out if your client is in a the position, were I to say, okay, government, I am going to impose these following — I've got some 14 conditions I guess. If he meets those, I am going to take the package, which is a fairly substantial property package, and I think that you once offered, and let him out pending the trial.

MR. KUBY: Mr. Pappas, as I understand things, the package that he's previously proffered is still available. He will consent to any sort of ankle bracelet and —

THE COURT: Oh, that would all be - I am thinking mainly of the guards and monitoring and the telephone and so forth.

MR. KUBY: He will consent to the monitoring of telephones. He will consent to a curfew.

THE COURT: He won't be leaving the house. There is no curfew.

MR. KUBY: Right. If necessary, then he will consent to home detention. I mean these are all things that can be accomplished at minimal cost and will not drain whatever assets Mr. Pappas and family members are able to raise.

If we talking about ten thousand dollars a week for guards, that obviously he can't afford it, his friends couldn't afford that either. But, you know, anything short of that, the kinds of conditions, short of draconian conditions.

THE COURT: There are going to have to be some guarding of the premises because if it's not the government is going to not even consent to putting this man available to his cohorts.

MR. KUBY: If you could just tell me what the Court has in mind.

THE COURT: Well, I think I will be able to do that shortly after 2:00 o'clock.

MR. KUBY: Fine.

THE COURT: I still want to consider a couple of points, but I think I might be able to have them in writing or draft writing for you at 2:00 o'clock.

MR. KUBY: That's very good.

THE COURT: But that is just one possibility. I want to hear what else you have in mind if anything.

MR. KUBY: What I would propose to the Court in terms of release of Mr. Pappas would be to release him under the bail package that he has submitted.

Certainly we consent to the ankle bracelet, monitoring, home detention, subject only to pre-cleared medical appointments, emergency medical treatment, meeting with his attorney. The whole panoply of conditions that are imposed, you know, to insure that there is no possibility of flight.

Of course I don't believe he has a valid passport now. Obviously he will not be permitted to obtain a valid passport. You know, those kinds of conditions we have no objection to.

The amount of property that is being posted, that his friends and loved ones have offered is in the area of a million dollars, a tremendous amount of money that would actually ruin numerous people should Mr. Pappas flee.

And so in terms of conditions, we have no objection to any of those and would in fact propose those to end what has become an extremely lengthy detention by all accounts.

Mr. Ryan has in fact resolved the question of how long it will take to get a jury cleared. Mr. Ryan has proposed –

(Defendant falls to the floor.)

MR. KUBY: Oh, my God.

MR. RYAN: We need medical help now.

THE CLERK: We have a nurse downstairs.

THE COURT: See if you can get the nurse right at the bottom of the stairs. See if the nurse can come up.

Mr. Kuby, do you want me to call –

MR. KUBY: Mr. Pappas appears to be in cardiac arrest.

THE COURT: Do you want me to call for assistance?

MR. KUBY: I mean I am no —

THE COURT: Do you want me to call?

MR. KUBY: Yes.

THECLERK: 911.

MR. KUBY: 911.

DEPUTY MARSHAL: They called already.

A SPECTATOR: Can I suggest a wet paper towel?

THE COURT: A wet paper towel?

A SPECTATOR: Yes, it can't hurt.

(Short pause in the proceedings)

THE COURT: Put on the record that at 12:30 medical assistance arrived with a medical stretcher and have taken him to the hospital.

(At the sidebar.)

THE COURT: Do you want to start the document examination?

MR. KUBY: No, Judge, under the circumstances.

THE COURT: All right. So we will be prepared to proceed on the 2nd.

MR. KUBY: Starting with the documents.

THE COURT: If you want to come back and discuss bail – but maybe we better wait on that.

MR. KUBY: I mean I think the bail issue is decisional at this point.

THE COURT: Well, I have yet to hear from him. I don't know whether – I mean I want to discuss the bail conditions.

MR. KUBY: Well, I would certainly be prepared to discuss the bail conditions in his absence. I can't review documents about which he has knowledge in his absence.

THE COURT: All right. Come back at 2:15.

MR. KUBY: Thank you.

(Luncheon recess.)

AFTERNOON SESSION

THE COURT: Do you have any word on the condition of your client?

MR. KUBY: Yes. I spoke to the marshals when I came in. They informed me that the hospital had decided to keep Mr. Pappas at least overnight for observation, possibly longer.

So in the light of the fact that he won't be returning today, the only thing I would suggest is that we at least conclude our bail discussion, which we were in the middle of, and you wanted to hear from the government.

And the other matters that remain, I don't have any sort of waiver from Mr. Pappas on, we can take them up on December 2nd.

MR RYAN: In that regard, Judge, we would like to submit later today or within the next few days an order to the Nassau County Medical Center and the ambulance service to obtain medical records so that we can forward that to the MCC and provide a copy – get a copy and provide that to defense counsel.

MR. KUBY: Without objection.

THE COURT: All right.

I had prepared a draft and put big draft on the top of that. Unfortunately I didn't. Of possible release conditions. And I will ask Miss Giangarra –

THE CLERK: Yes, I have it right here.

MR. RYAN: Judge, the nature and the number of conditions is something that I think the government can take up with the defendant to discuss further.

But the question as to the costs, the type of sureties that are now available since he has filed for bankruptcy and what is available as third-party sureties, which have changed from his last package, need to be discussed by the defendant and presented to us so that we can make rational decisions on this.

This does not on its face appear to be impossible in theory. Whether we will or will not agree is not something that I can determine at this point. But it's something certainly that is subject to further discussion.

THE COURT: Well, who, may I ask, is in control of this litigation if you are not?

MR. RYAN: Well, Judge, I would have to consult with Mr. George Stamboulidis, who is my supervisor and also assigned to assist in this case.

THE COURT: Where is he?

MR. RYAN: I believe he was on his way when I last saw him. He was –

THE COURT: Here?

MR. RYAN: He was on his way here.

THE COURT: He has a long lunch?

MR. RYAN: No, Judge. I think he said he was arguing on some other Colombo case this morning in Brooklyn before Judge Weinstein.

THE COURT: So he's coming out here?

MR. RYAN: Yes, Judge. But I don't think this is something — given the fact that the defendant is currently in bankruptcy, his assets, I discussed —

THE COURT: Well, he's got some very well to do friends, accerding to his lawyer.

MR. RYAN: Well, Judge, who those friends are, what assets they would offer to pledge and the amount they would offer to pledge is something that we — still is an unknown quantity. We can't make a determination unless we know who and what the suretyship is that is being offered.

And at this point we have not had an acceptable package ever presented to us. And that would be something that we would — if Mr. Kuby believes that that is possible, as he said earlier in the day, then it's something we would want to see.

THE COURT: It sounds like there's some concern.

MR. KUBY: Two matters, Judge. First, with respect to the suretyship, on the two prior occasions we submitted a list of sureties and property they were willing to post. Essentially it's unchanged from one to the other.

I have no current information that the status of those individuals or that property has changed, except of course to the extent that there is a bankruptcy and it covers any of Mr. Pappas' assets.

So I would propose that we use – and I say this in open court and I will speak to Mr. Ryan about it, that we use that proposal as a bench mark. I mean, given the fact a surety hasn't lost a piece of property or sold a piece of property, we will deal with that. But the basic package that we've been putting forward is essentially the one we would like to seek considered by the government.

The second issue is — relates only to proposed release condition number 5. All of the others are acceptable. They are restrictive. I would say almost draconian, but acceptable. Perfectly acceptable.

THE COURT: Well, we have — the government has the problem not unlike the one that we have been listening to on the radio which even enlisted the voice of the Governor of the State of New Jersey, where someone was wearing an electronic bracelet and has now disappeared with the family china and has gone no one knows where.

MR. KUBY: Judge, he was a former prosecutor.

THE COURT: Well, this guy is former member of an alleged —

MR. KUBY: All right. So he's not a bad guy.

THE COURT: - family. That's what they're alleging.

MR. KUBY: I understand the government's concern. I just think number 5, we need to get a dollar figure for it. But I mean I have consulted briefly. I understand with Masotto I believe it was like ten thousand dollars a week for guards outside. That would be totally prohibitive, you know. It just wouldn't be possible, but everything else is possible.

THE COURT: How many exits do we have in this Oyster Bay mansion?

MR. SPIEGEL: I've never been there. I don't know. I believe there is a security gate.

THE COURT: Pardon me?

MR. SPIEGEL: I don't know, your Honor, but there are some security precautions which are part of that community or the property itself. But I can establish that. I can call my client. She's available right now on the phone.

THE COURT: Well, let me ask you this. Is it waterfront? Is it a case where you – I mean he can't go down to the water and hop on a boat?

MR. SPIEGEL: Commack is not waterfront.

THE COURT: Commack?

MR. SPIEGEL: Commack.

THE COURT: I thought he lives in Oyster Bay.

MR. RYAN: No.

MR. SPIEGEL: No.

MR. RYAN: He's moved, Judge. Sold that house and they bought a different house in Commack.

THE COURT: So that is not exactly waterfront.

MR. KUBY: No.

THE COURT: How big a parcel is it?

MR. SPIEGEL: Your Honor, if you like, you can excuse me for one moment and I will make a telephone call.

THE COURT: I will. Go make a call and ask things like the number of exits in the house, size of the plot, all one story or two stories, nearest road. I mean if it's got roads on three sides of it we want to know about it, so to speak.

MR. SPIEGEL: I will be right back, Judge.

(Short pause in the proceedings.)

MR. SPIEGEL: Your Honor, you know what it's like when you try to get a witness on the witness stand to describe something in word when you can't see it, but I am going to do my best.

THE COURT: And somebody right on the premises can't remember whether she has a back door or a front door.

MR. SPIEGEL: Well, I think I've got a pretty good picture of it, Judge. It's as follows:

It is a two-story home, attached on one side. A row house I suppose is what we would call it, except it's more rural.

Hamlet Drive – the address is on Hamlet Drive. Hamlet Drive is a dead end street it has a security gate that any automobile that wants to get to her house must pass through the security gate for that community of houses.

It has a garage on the ground floor. There is an entrance into the home through the garage. There is also one side entrance on the opened side. That is, there are three sides of the home that are open. One side is attached.

There is small backyard, maybe 30 feet from the back door of the home to the back fence. And that fence totally encloses the backyard.

THE COURT: Is there a door on to the backyard?

MR. SPIEGEL: There is a door from the home into the backyard, yes.

THE COURT: There is a side door, back door and a front door.

MR. SPIEGEL: Well, the garage, a side door and a back door. The back door, however, is — has a fence. You know, the part that one would walk out of the back door would be into an enclosed area.

THE COURT: This is not a big plot of land.

MR. SPIEGEL: Very small. A little patch of lawn in the front next to the garage. Her guess was that it was 30 feet from the back door to the back fence.

THE COURT: How big is the fence?

MR. SPIEGEL: The fence is relatively low, apparently four or five feet. But it was my thought, as a matter of fact, that one thing that might be able to be done would be to make a much higher fence, which would be a more limited extent. And that clearly would – Mr. Pappas – that no person could surmount, I guess is my way of –

THE COURT: Well, it's not just the surmounting it. It's somebody coming through. I suppose even if it's metal.

But anyway, let's see what their view – whether this effects their view of — assuming, Mr. Ryan, you've got the same security that you proposed

before and assuming that somehow or other he could meet these expenses, do you think it's doable?

MR. RYAN: I think it's within the realm of possibility, Judge, though the suretors that we had before were unacceptable to the government. We would like to see a number of the defendant's siblings, his parents, his mother and others on the bond as well. They were not offered in the past. We would like the children on the bond. And then a current title and lien searches on all the property and some idea of the amount of the property that currently exists. That's certainly something that we could discuss with the defense, Judge.

We would also look at the other Colombo family related releases. If it's going to occur, there will be a blanket band on the introduction of any communication devices in the house, including portable phone.

THE COURT: Cellular phone.

MR. RYAN: Cellular phones, Faxes, beepers. And that there be only one line of communication in that — and would be monitored constantly at the defendant's expense.

These were our restrictions that have been applied in other cases involved in the Colombo family.

We would also probably ask the defendant only leave for either emergency hospital confinement

or previously scheduled and escorted visits to his doctor or lawyer.

THE COURT: I said his lawyer must come to him in my draft, but you can work that out to see if that is acceptable.

MR. SCHWED: Your Honor, if I may, my name is Nathan Schwed. I'm with the firm of Zeichner Ellman & Krause.

THE CLERK: Will you spell your name, please?

MR. SCHWED: S-c-h-w-e-d. I am counsel to the bankruptcy trustee.

The issues raised day regarding bail do effect the bankruptcy estate and to that extent I would like to put our opposition on the record

THE COURT: Well, wait a second. You heard the way he describe where he's going to get the money from. How does that effect the bail?

MR. SCHWED: It does. Your Honor, it's my understanding that part of the package that's being offered is a piece of property in Freeport which was owned by Mr. Pappas and Mrs. Pappas previously and now is only owned by Mrs. Pappas because he transferred it to her. The other piece of property or one of the other pieces is property in Commack which was purchased after they sold the Oyster Bay Cove house, which again Mr. Pappas had owned, and then they bought Commack in her name only.

So it's Mr. Pappas putting up two houses that my client has claims against as 50 percent owner, or the proceeds of a fraudulent conveyance. That money can't be used for – to be posted as bail. So half of the equity into these houses belongs to the trustee. And to the extent that Mr. Pappas is looking to post that, we object to that, your Honor.

MR. RYAN: Mr. Schwed, the fact that some of the money coming to pay for the guards or for the cost of confinement comes from the wife, would that cause your client, the bankruptcy trustee, any problem?

MR. SCHWED: Well, obviously, your Honor, we have claims against Mrs. Pappas in general. I mean there is money — there is a lot of money that was transferred. But at this point I don't have enough information regarding the monetary transfers. I do know the houses clearly belong 50 percent to the trustee.

MR. KUBY: Judge –

THE COURT: No, but the – because they formerly belonged to the defendant and they showed up – the proceeds seem to have shown up in her name.

MR. SCHWED: Yes, Judge.

THE COURT: I just wanted to find that out. Okay. I am sorry.

MR. SCHWED: Yes, Judge. Assuming that we end up agreeing, or you end up ordering that Mr. Pappas should no longer be detained, the question then becomes what the amount of the bond should be and we will accept that.

Who is the signatories should be. I certainly will inquire of his children as to whether or not they will sign on the bond. And what property should be placed as security.

If Mr. Schwed, who is, you know, sitting there at the government's, objects to a particular piece of property being pledged and the government says they don't think that piece of property should be pledged either, then Dennis Pappas won't pledge it. He will only pledge what he has to pledge and what he can get his friends and relatives to provide as sureties.

I don't have a problem with that. I'm simply trying to put together the biggest package I possibly can. But if people on this side of the room are saying you shouldn't include this piece of property, then we won't include it.

MR. RYAN: Well, Judge, I guess the best thing for us to do is see what they propose as to who the particular sureties are.

THE COURT: No. Well, yes. But you have to work out with Mr. Schwed whether, for example, he can – I don't know whether it does the government any good whether he mentions 50 percent interest in these properties. I suspect that will not amount to

much because he does no good if he flees because it's a non-asset, but I will leave that up to you.

MR. RYAN: That is something we will have to check out as to the legal consequences of his bankruptcy filing.

THE COURT: I mean technically she could transfer the property back to his name, but then –

MR. RYAN: Judge, perhaps it will be best if between now and our next appearance on the 2nd, if the defense presents us with additional facts concerning the surety, the amount, and the current state of the equity, and if we would be able to report back to you with more understanding of what it is that is being offered.

MR. KUBY: I mean I am happy to communicate with Mr. Ryan, but my understanding of what is being offered, based on what my client and his wife had told me over the past 16 months, is that essentially the same things that have been offered before, subject, of course, to these objections with respect to these two pieces of property.

So we can at least take those pieces of property that aren't subject to objection, that we have submitted in the past –

MR. RYAN: Judge, without title insurants, without current —

THE COURT: Yes, but what he's saying he wants to take those — or he wants you to get to work

getting whatever appraisals you want and he will authorize you to obtain title insurance, which I guess is appropriate.

If you want to do that extra work for the property I think that's your expense, not his. He's offering it to you. He says –

MR. RYAN: Judge, it's normal for the defendant to provide a current status of the equity of this – the particular houses and not for us to investigate the —

THE COURT: But you would want to do it anyway.

MR. RYAN: Well, Judge, we normally don't do it independently. We have this done by the defendant and then we examine it.

THE COURT: You're going to accept his appraisal?

MR. RYAN: Judge, we don't know until we see who it's done by and how it's done. But usually in preparing the package, the defense offers us the title search and –

THE COURT: That doesn't work that way. If you guys can agree upon an appraiser the person who is going to put a value on the property, that will save both of you double duty. Then I may be able to –

MR. RYAN: Well, it's also the amount of the – the information that is in the defendant's control is what is the amount of the mortgage is, what the –

THE COURT: He will give you all that. That is no big deal.

MR. RYAN: It's no big deal, but they haven't done it yet Judge.

THE COURT: Well, they did do it in connection with the bail application.

MR. RYAN: They've never done it. It's never been presented to us.

THE COURT: I don't know. There was a bail package.

MR. RYAN: Judge, there was — they have never presented us with any of that information about the particular houses.

MR. KUBY: I am sorry, Judge. We submitted a detailed bail package. And if Mr. Ryan wanted anything else or wanted anything else that we know of, I mean I'm happy to give it to him. I don't know specifically what else, what more he —

THE COURT: He wants some sort of a title certificate.

MR. KUBY: I am sorry?

THE COURT: A title certificate. If you have a title certificate from when they purchased it, a title report, make a copy and give it to him.

MR. KUBY: Okay.

THE COURT: He wants to make sure that the title is legitimate.

MR. KUBY: Sure.

THE COURT: He wants to have – if you have recent appraisal, give him the recent appraisal and let him get another one.

MR. KUBY: All right.

THE COURT: And he wants to know what the current paid down mortgage value is and how much has been paid off on the mortgage and so forth, assuming there are mortgages.

MR. KUBY: I'll start trying to obtain that information from the various sureties. I have no problem with that. I am happy to.

MR. RYAN: Judge, we need the current title reports and appraisals. That's precisely what we are looking for.

THE COURT: Well, if he's got one when they bought the property two years ago, a title report, I am not going to order another one.

MR. RYAN: I understand that, Judge, but the question of liens on the house that have occurred is something that the — of course, makes a big difference as to whether it provides a surety. That is something they normally would be able to provide very quickly.

MR. KUBY: I will get to work on it. I guess we will work on it. I mean, you know, we will find a lawyer who does this kind of thing and he or she will, you know, do all that stuff that they do. I guess there's a technical term for it, Judge.

THE COURT: No, it's a title search.

MR. KUBY: Okay.

THE COURT: When you get to the closing the guy calls up Joe. And Joe says nobody filed a lien in the last 24 hours and then you go ahead and close.

MR. KUBY: I will again go over these conditions with my client when he's capable of dealing with them. As I say, I think everything will be fine. The only potential problem deals with number 5, the expense of the guards. Hopefully we will work that out. I will try to work that out.

THE COURT: I think the government ought to make an inspection. It's not a big deal to make an inspection and find out what you think you're going to need out there.

MR. RYAN: Exactly, Judge. And I mean that's why I said earlier that we need additional

information. We will have the company that provides this type of security make an inspection and give a recommendation as to what will be required to provide security for this house as described.

THE COURT: All right.

MR. KUBY: And I assume we will be addressing the remaining matters when we get back to your Honor on December 2nd.

THE COURT: Whatever you want. That's okay with me.

MR. KUBY: All right.

THE COURT: I'm available.

MR. KUBY: I checked with your calendar clerk. I just want to raise my Kansas trip again, which is not just for me. My family also has prepaid tickets because we all went to school out there.

THE COURT: Mr. Kuby, you can go for the next year, but just don't blame me and Mr. Ryan for delaying the trial.

MR. KUBY: No, I will not. I will put on the record right now that I have prepaid tickets to leave New York on the 5th of December, through the 5th, 6th, 7th, 8th, 9th, and 10th, and I will be back on the 11th. I will be here working before you, with your permission, on the 2nd, 3rd, and 4th and the days that –

THE COURT: Of what month?

MR. KUBY: Of December.

THE COURT: I see.

MR. KUBY: And the days that I am off, obviously I'm accountable for and take responsibility for.

THE COURT: What about that, Mr. Ryan?

MR. RYAN: Judge, anything to get this case moving.

THE COURT: Well, it does seem we aren't moving fast.

Laura, we will put those people on the 2nd on the 5th.

THE CLERK: The 3rd and 4th.

THE COURT: He's going to be here the 2nd, 3rd, and 4th. We can put the other case on the 5th.

MR. KUBY: Lastly, Judge, now that Mr. Stamboulidis is, maybe we can figure out the status of my contempt.

MR. RYAN: Judge, we will not be withdrawing the application.

THE COURT: Well, I am not going to hear the contempt at this point.

Furthermore, I am not so sure I should hear it anyway. I may refer it to either a magistrate judge or another judge. The point is that at this point this would involve an inquiry into what Mr. Kuby knew and when.

And the government would have to be prepared to show that he knew that this was sealed material. This is what the contempt is all about. And that he deliberately violated an order of this Court

I don't think I should sit on that. Furthermore, I don't want to sit on it because I think I am going to be judging the case as a whole. And I don't think I ought to be judging the attorneys in the case on a matter of that kind.

So that when you are prepared to proceed with that, if ever, I will make appropriate arrangements.

MR. KUBY: I wish to make two points in response to that Judge.

Number one, the Court I think would probably have the option, if the Court so desired, to unseal that affidavit nunc pro tunc to permit the use to which I put it. So there would in fact not have been even a technical violation of the Court's order, if the Court were inclined to do that and end this – and end this now when it should be ended.

The second point I would make, Judge is this: When Mr. Ryan stood in front of you on November 12th, you inquired of him, quotes, as to the status of

your matter in the Court of Appeals — that was the transcript of November 12, 1996, at page 3, Mr. Ryan replied:

We have filed the brief requesting rehearing, but we have not heard anything at all from the Court of Appeals on that.

In fact, on November 1st, eleven days after Mr. Ryan stood there and said he knew nothing from the Court of Appeals, the Court of Appeals in fact had denied that petition for rehearing by order dated November 1st.

Now I am assuming — I'm assuming that Mr. Ryan didn't lie to the Court when he made that representation that we heard nothing. I'm assuming that the filing of that document, even though it's an appeal on which he had primary interest, even though he was lead counsel on that appeal, and even though it happened just eleven days before, I am assuming that he didn't notice it and that it was an honest mistake.

And I would simply like the same consideration, Judge.

MR. RYAN: Actually, Judge, Miss Underwood was lead counsel in that appeal. She received a notification and I only received it E-Mail after my court appearance on that date as to what had occurred, and, as a matter of fact, did not receive a copy of the Court of Appeals order until even after that.

MR. KUBY: It was filed on November 1st in the Court of Appeals. It was in on the docket I got my copy well before that. Mr. Ryan was in charge of this entire case. It had happened only eleven days before when he was counsel on the case, which is more than I was on October 2nd.

THE COURT: I am not going to prejudge this either way, Mr. Kuby. I tell you in nine cases out of ten where the case is before me, they call me on the day that they make the decision. They didn't call our chambers on that case. I don't know what they did up there. I didn't know anything about it. I didn't know until about a week after you told me. I got a copy of what they did.

So I can't say that Ryan knew for certain.

MR. KUBY: I don't think he did, Judge. I think that he was in a position to know. He could have known. I don't think he did know. I don't think he stood here and lied to you.

Just like I don't think Mr. Ryan really thinks that I sat down and knowingly handed over a sealed affidavit to somebody saying, go ahead and file it in court not under seal. I really don't believe he believes that.

And I really believe that this contempt order ought to be withdrawn. Or if Mr. Ryan will not withdraw it because of his own sort of vendetta, then I think the Court ought to go ahead and unseal that affidavit nunc pro tunc as the Court has essentially

done or almost essentially done today already and that solves that problem. That would be my request.

THE COURT: Well, I will reserve on it.

MR. KUBY: Thank you. Judge.

THE COURT: At the moment. But I would urge Mr. Ryan to talk to the — if he's going to turn this into a personal matter between him and you, and I don't think that has any place here. I'm not going to sit on it. I may give it to another judge or another magistrate judge to hold a hearing and decide what to do.

I think the appropriate way — that's what Judge Glasser did in the case of Mr. Cutler and so forth. I think I should not sit on it.

MR. KUBY: Well, I think ultimately – I think ultimately that's true, Judge. But then what I have to do is I have to go out and retain counsel and deal with this entire proceeding against me.

THE COURT: Well, he may have to do – based on what you're saying.

MR. KUBY: Right. Should I – I will go ahead then.

THE COURT: Don't do anything at the moment because I might just let him —

MR. KUBY: I will withhold my controls motion then. Thank you, Judge.

THE COURT: Do we have anything else that we should discuss while we have everybody here?

MR. KUBY: I don't think we can discuss anything else without Mr. Pappas.

THE COURT: All right.

MR. RYAN: Oh, Judge, there is one thing. In the bankruptcy court we have – there is an order entered by the bankruptcy judge permitting us to turn over and to permit inspection of any of Mr. Pappas' documents to the bankruptcy trustee.

I just wanted to let your Honor know about that. Counsel for the trustee. I think the major purpose —

THE COURT: Well, Bankruptcy Judge Cyganowski will be the first to say that she's not going to attempt to overrule an order of this Court. I don't think she purports to do that.

MR. RYAN: No, I don't think that was her intent at all, Judge.

What happens though that in some of the non-relevant documents of Mr. Pappas that we have in our is possession are certain assets that the trustee is anxious to get hold of. And we have no interest in holding on to them, though we have not turned them over because we are in between two courts here and need some direction as to who should get these assets.

MR. KUBY: I actually can be I think of some assistance in dealing with this particular problem without going into the outstanding discovery matters. It will have to wait for Mr. Pappas.

My only concern with respect to these issues is to make sure Mr. Pappas reviews documents he needs to prepare his defense. To the extent that Mr. Ryan has seized in the course of these various searches assets of Mr. Pappas that he believes properly belong to the trustee, I would simply ask that he give me a list of those and I will okay that. And then we can all do it on consent.

I have no interest in trying to take assets of Mr. Pappas' out of the hands of the bankruptcy trustee. And I told the bankruptcy trustee this on numerous occasions.

THE COURT: All right. That should solve that one I suppose.

As you know, Mr. Schwed, the filing of a bankruptcy, theoretically anyway if not legally actually, stays all civil proceedings. At the moment I am staying the civil proceeding, but let's assume that somewhere along the line I change my mind on the civil proceeding, what – do you know what the position of the bankruptcy court is going to be with respect to this proceeding, with the civil proceeding that Mr. Ryan has started?

MR. SCHWED: Your Honor, I haven't seen the documents in the civil proceeding. I can't speak

to the precise relief being sought. I don't know what they are seeking.

THE COURT: Well, the government is suing on this alleged contract that exists between the government agent and the defendant. And we are going to have a hearing on that hopefully beginning on December 2nd or not long thereafter.

And when the case was started I was unaware of the fact that this bankruptcy proceeding had started. I honestly wasn't. The first time I heard about the bankruptcy was in this courtroom. I guess somebody mentioned it. Nobody notified me, although under attorney lingo, I'm in the same court as the bankruptcy or I should have known.

MR. KUBY: Right.

THE COURT: I didn't.

But, in any event now, then the – then the government having started the suit says, well, we understand it's stayed by the facts as Mr. Kuby says, we have no interest in staying it. Obviously he wants to proceed with it.

I am going to stay it pending the resolution of this criminal matter, if we ever get the criminal matter off the ground.

But I would like to know what the — if the matter comes up again I want to know what the bankruptcy judge's position is and what your position is going to be.

MR. SCHWED: I can tell you that the trustee's position is that to the extent that the government has a civil claim, it should file a claim in the bankruptcy court for that claim.

THE COURT: Well, its not a monetary claim per se.

MR. SCHWED: If it's more than a monetary claim, I don't know what it's for so I – I really can't respond without knowing what the —

THE COURT: It's a question of what – it's a declaratory judgment that there was this enforceable contract between the defendant and the government agent.

MR. SCHWED: And he seeks only the declaratory judgment and no other relief other than–

THE COURT: No other relief. I think I'm right.

Now there are counterclaims that seek some relief, but we are not up to the counterclaims yet.

MR. KUBY: He owns the ten million dollar counterclaim.

MR. SCHWED: Well, in fact that raises another issue. I don't think that Mr. Pappas can actually pursue such a counterclaim on his own. I think only the trustee — he would need the trustee's permission. He has no standing since he doesn't belong there. So let's put the counterclaim aside.

With respect to the —

THE COURT: Well, he can get permission.

MR. SCHWED: Well, I believe the state of law in the bankruptcy court is that he could only get permission from the bankruptcy court if he asks me or the trustee to do it and we refuse, then he can make a motion under the bankruptcy court to get permission of the court to do it. But he has to go through the steps.

THE COURT: But at the moment it's somewhat academic. The main question is if I decide somewhere along the line after this hearing – and this is the government's only recourse to enforce this agreement.

Let's assume I say I think there is an agreement. Mr. Kuby's position then as I understand it is, Judge, you can't make that determination. You can make the determination that there was no agreement, whether the government's evidence to it is in. I want a jury to determine the enforceable agreement.

Mr. Ryan's counter to that I am sure will be seeking equitable relief not legal relief, ergo it's your job, Judge, to enforce it.

Let's assume he's right and he's entitled to a jury trial on that issue.

At this point let's assume for some reason or other that the — I need this information. I need it

for this determination prior to trial. I want to know what the position of the trustee in the bankruptcy court is.

MR. SCHWED: I think technically, your Honor, any action, any civil action at all would be a rise in the stay, but there are provisions to get relief from an automatic stay. And I think —

THE COURT: Well, the government ought to be in a position to do that.

MR. SCHWED: That's what I would think. So to the extent that the government wants to proceed with a civil action they would make a motion before Judge Cyganowski asking for relief from an automatic stay which the Court, you know, will make a decision on.

THE COURT: All right

MR. KUBY: Judge, if I could just reply briefly.

Certainly my embryonic understanding of the bankruptcy law is the automatic stay provision does not apply to suits for injunction relief brought by the government to enforce its police or regulatory power, whit h arguably this would fall within it. So I don't think that the suit that Mr. Ryan brought –

THE COURT: Yes, but Mr. Ryan can't lift the stay. He has to get — you may be right in your contention, but it's technically — it is stayed under the bankruptcy.

MR. KUBY: Well, I don't – I mean – again, I don't know that that is true. There is sort of two provisions that work.

One is, what is the extent to which there is a stay in effect? Does the stay cover this kind of suit?

If the stay does cover this suit, then of course Mr. Ryan has to make a motion to the bankruptcy court for relief from the stay.

However that mechanism is done, the only thing I would suggest is this: Assuming that all Mr. Ryan ends up left with at the end of this is his civil action, the last relief he has under the Court of Appeals decision, I think that he should make whatever applications he needs in order that that civil action be filed.

THE COURT: We can't practice law for him.

MR. KUBY: No, I understand.

THE COURT: We had had this discussion so that it's out in the open. There may be a change in bankruptcy law since I was practicing law, but the rule always was that it stayed all actions.

It stayed the action in — all actions against Pan Am in the Lockerbie case even though they weren't the real party in interest They had no money and they were looking to the insurance carrier for money. They were the real party in interest, the insurance carrier. But stayed the action against Pan Am until Judge Blackshire lifted it.

MR. KUBY: Whether that is correct or not, whether the government has to move for relief from the stay or not, obviously are questions that need not be addressed today except to this extent.

THE COURT: Except to alert Mr. Ryan as to what he may have to do.

MR. KUBY: Right.

MR. SCHWED: Your Honor, just to clarify. There is an exception for regulatory power. I think the problem here — I mean we would not have to seek relief from the stay for that. The problem is whether or not —

THE COURT: This is a regulatory power.

MR. SCHWED: That's the question. That I can't speak to.

THE COURT: This is a civil contract, according to the — the implication by the Court of Appeals is that it's a civil contract. They want it enforceable. Not as a regulatory matter but between two parties who made a contract.

MR. SCHWED: That's what I would think. They probably think that it's not regulatory and the stay should apply.

THE COURT: That's right.

Okay, gentlemen.

MR. STAMBOULIDIS: Your Honor, I'm George Stamboulidis. I'm assisting Mr. Ryan and he's graciously allowed me to request — to be able to address the Court on one housekeeping matter which is the speedy trial clock. I understand that the Court designated this by agreement with the parties that it's a complex case.

Would you hear from me for a few moments on this?

THE COURT: You don't think it's a complex case?

MR. STAMBOULIDIS: I agree it's a complex case, but I don't think that does it. I think the Court's and all parties' interest would be served by following the practice that is recommended by the Second Circuit in Gambino. They frown on the practice of just designating it a complex case without picking a trial date and just sort of going along.

And since this case has had its share of delays, I think all parties would be served, and I apologize for not having a chance to raise this with defense counsel earlier, but I can't see them having an objection, although I am happy to be corrected.

THE COURT: Were you here the last time when we discussed this problem?

MR. STAMBOULIDIS: I read the transcript.

THE COURT: You see, this is not a –

MR. STAMBOULIDIS: I don't mean to interrupt your train of thought, but —

THE COURT: No. By my rough calculations this is four month process from the moment we launched the jury summonses before we can get the case on for trial. Everybody agrees that we are going to have to summon six or seven hundred jurors to get any — maybe four hundred.

And then we are going to pass out, depending a little bit on the conclusions that we reach and one aspect of the motions we are discussing here this morning. We are going to pass out a set of questionnaires to the four hundred jurors, two hundred in the morning, two hundred in the afternoon.

And then they are going to have to review those questionnaires for challenges for cause. And I am going to — those they agree upon, fine. As to those there is dispute about, I am going to have to determine whether they go for cause or not. Then if we are lucky we end up with about a hundred jurors.

Both sides seem to want to have Internal Revenue checks made. I have had estimates between two to four weeks to have this done even on an expedited basis.

Then we call in the panel of what is left. Maybe 75 jurors. And hopefully we get a little bigger courtroom than this to work in. And we spend maybe a day or a half day, depending on what we have left in peremptory challenges. Then we have a jury.

Now that's — I mean in my experience the last few times I've done it, it takes three to four months. Probably four in this case to do.

I don't know how I can set a jury trial date when we — when we haven't even gotten the basic – a lot of the basic questions out of here.

MR. STAMBOULIDIS: I understand the situation the Court is in and I don't disagree with your calculations. My suggestion would be the one that is followed by other judges in the district in light of Gambino would be to select a trial date, recognizing that it may not be the actual trial date, and in light of the hearings that are going to be held beginning December 2nd and issues the Court will rule on thereafter, the trial date may have to be moved back. And then speedy trial and the exclusions will be continued to the new trial date.

But that's the practice that is – from my reading of Gambino seems to be encouraged and I am concerned that we might still – even though your Honor has made a valid designation of this case as a complex case and thereby excluded speedy trial, or attempting to exclude speedy trial until the date of the trial, the Circuit may have a problem with that based on their decision in Gambino.

I don't think anyone is prejudiced by setting what we might call a knock down trial date at some point in the future and we may be able to keep that trial date if everything works as expeditiously as it usually does here.

THE COURT: Well, I'm willing to go along with Alice in Wonderland fantasies to keep the Court of Appeals judges happy if you think that is what it will do. But it's – that kind of an approach to the practical problems doesn't make very much sense when you get down with both feet on the ground.

Let's have a trial date for March 3rd or something and it's surely hypothetical.

MR. KUBY: Yes, I'm not willing at this point to go along with setting a date which we all recognize to be utterly chimerical.

THE COURT: This is for a bookkeeping entry.

MR. KUBY: Pardon me?

THE COURT: This would be a bookkeeping entry. I would make Miss Giangarra set down a tentative trial date on a docket and on our books, so that when President Sullivan replaces you, he comes in here and says, I never consented to any of this, we have a book entry.

MR. KUBY: Well, in that case, Judge, let's set it appropriately enough for April 1st.

THE COURT: That's a bad date. I have a case that I set for somebody on April 1st and he came back here yesterday and said that I was then represented on April 1st by a person who was not an attorney and my sentence was invalid.

MR. KUBY: We consent to April 2nd.

THE COURT:

THE COURT: March 31, 1997.

MR. STAMBOULIDIS: And I'd just request that the – I think it's implicit, but I just request that the Court make the finding that the time of the speedy trial clock is excluded between now and the date by agreement of the parties, and also the condition of Mr. Pappas' unavailability.

THE COURT: On the basis that I just outlined.

MR. KUBY: You know, I am sorry. I haven't read Gambino recently, but I bet when the Gambino Court decided that, they decided on this when the defendant was present.

So before I go ahead and make consent to exclusions in the absence of my client who is in the Nassau County Medical Center, maybe we should do this again when he's absolutely present.

THE COURT: We should do it on the 2nd.

MR. KUBY: Yes.

MR. STAMBOULIDIS: That is fine, but at least the Court can make the finding that the defendant is physically unavailable right now, so the time is tolled from –

THE COURT: I don't have to make a finding. It's on the records this morning. We even had the record timed when he was picked up, put on a stretcher and taken out of here.

MR. STAMBOULIDIS: I understand, your Honor, under –

THE COURT: He hasn't come back.

MR. STAMBOULIDIS: But under 3161 sort of suggests the Court makes the finding.

THE COURT: Oh, come on. I mean I know they operate on an ivory tower up there, but it's not that much of an ivory tower.

MR. STAMBOULIDIS: I wasn't suggesting that, Judge. Thank you for hearing me.

MR. KUBY: Nice to see you again, Judge.

THE COURT: Wait a second. They are going to work on the redactions.

(Deputy clerk confers with the Court.)

THE COURT: Nothing has been ordered sealed. Nothing has been sealed today in today's colloquy.

MR. KUBY: Nothing has been sealed.

THE CLERK: Even on the civil case?

THE COURT: Nothing. But he's going to work, Mr. Kuby, and Mr. Londergan to edit the civil filing and they are going to open it up hopefully on the 2nd.

MR. KUBY: We can do that right now, Judge, since we are all here.

THE COURT: All right.

(End of proceedings.)

28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute

with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites[1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

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[1] So in original

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

18 U.S.C. App. 3

CLASSIFIED INFORMATION PROCEDURES ACT

§ 1. Definitions

(a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

18 U.S.C. App. 3

CLASSIFIED INFORMATION PROCEDURES ACT

§ 3. Protective Orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States

18 U.S.C. App. 3

CLASSIFIED INFORMATION PROCEDURES ACT

§ 6. Procedure for cases involving classified information

(a) Motion for Hearing.

Within the time specified by the court for the filing of a motion under this section, the United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection (or any portion of such hearing specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the United States' motion under this subsection is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(b) Notice

(1) Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with

notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by general category, in such forms as the court may approve, rather than by identification of the specific information of concern to the United States.

(2) Whenever the United States requests a hearing under subsection (a), the court, upon request of the defendant, may order the United States to provide the defendant, prior to trial, such details as to the portion of the indictment or information at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

(c) Alternative Procedure for Disclosure of Classified Information

(1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

(d) Sealing of Records of In Camera Hearings.

If at the close of an in camera hearing under this Act (or any portion of a hearing under this Act that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or pretrial proceeding, the record of such in camera hearing shall be sealed and preserved by the court for use in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(e) Prohibition on Disclosure of Classified Information by Defendant, Relief for Defendant When United States Opposes Disclosure.

(1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

(A) dismissing specified counts of the indictment or information;

(B) finding against the United States on any issue as to which the excluded classified information relates; or

(C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

(f) Reciprocity

Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.